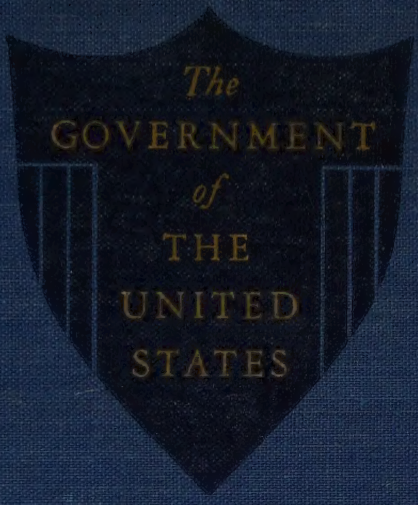

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THE GOVERNMENT OF THE UNITED STATES

BY THE SAME AUTHOR

THE GOVERNMENTS OF EUROPE

THE GOVERNMENT OF EUROPEAN CITIES

THE GOVERNMENT OF AMERICAN CITIES

MUNICIPAL ADMINISTRATION

PERSONALITY IN POLITICS

THE INVISIBLE GOVERNMENT

MAKERS OF THE UNWRITTEN CONSTITUTION

THE GOVERNMENT OF THE UNITED STATES

NATIONAL, STATE, AND LOCAL

By WILLIAM BENNETT MUNRO
CALIFORNIA INSTITUTE OF TECHNOLOGY

FIFTH EDITION

WITH THE COLLABORATION OF ARNOLD J. ZURCHER,
NEW YORK UNIVERSITY, AND THE LATE
EDWARD M. SAIT, POMONA COLLEGE

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PREFACE

The purpose of this book is to provide a general survey of the principles and practice of American government. It endeavors to explain the origin and purpose of American governmental institutions, to indicate what they are expected to do, and to show how they do it. The government of the United States is pictured in this volume as a going concern, with merits and defects which have been developed by time and usage, — a government in which the actualities do not always conform to the ideals professed, yet has preserved for its people a larger measure of real democracy than can be found anywhere else in the present-day world.

The plan, scope, content, and temper of this book are in large measure the outgrowth of my experience as a teacher during the past forty-five years. My students, by the drift of their questions and discussions, have moulded my ideas as to what a textbook ought to be. This book is theirs as much as it is mine. That may help to explain why the same topic is sometimes taken up more than once, from different points of approach, in different chapters. It is not unintended repetition but the outcome of a desire to stamp on the reader's mind some things that are more elusive than one might think.

For this fifth edition the text has been almost entirely rewritten. Some new chapters have been added; a considerable amount of fresh material has been incorporated, while the emphasis has been shifted in keeping with the new political and economic orientation of recent years. The lists of bibliographical references at the close of each chapter have been rearranged and extended.

The one thing that has not undergone a change is my conception of what a textbook ought to be. It is still my conviction that the history, organization, and actual workings of a government are so closely interwoven that they should be studied together, not as independent and dissociated matters. I also confess that I have tried, perhaps with indifferent success, to make this volume reasonably interesting, as textbooks go. For I have learned, during an active lifetime of contact with college undergraduates, that there are many among them who do not find the study of government an easy task even when its problems are presented to them in simple language.

In my work of revision during its early stages I was greatly aided by the late Edward M. Sait of Pomona College, and in its later stages the collaboration of Arnold J. Zurcher of New York University has been most helpful to me. Mrs. Ethel H. Rogers has faithfully assisted me in preparing the manuscript for the press, checking the lists of references, and making the index.

WILLIAM BENNETT MUNRO

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THE GOVERNMENT OF THE UNITED STATES

CHAPTER I

THE STUDY OF GOVERNMENT: WHY AND HOW

This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. — *Blackstone.*

What is government and why should anyone study it? It is not easy to answer the first half of that question — to give a definition which will include all that comes under the head of government and exclude everything that does not. Nevertheless a definition is an essential starting point in the scientific discussion of any subject, for there is nothing more confusing than the use of undefined terms which may mean different things to different people. Such terms, for example, as government, politics, administration, and democracy are sometimes so loosely used that they create no end of confusion.

WHAT IS GOVERNMENT?

Government is the mechanism through which the public will is expressed and made effective. Sometimes the public will is voiced by the people directly, through the agency of the initiative and referendum, but more often it is made manifest by action of their elected representatives in parliaments, legislatures and municipal councils. Constitutions, laws, and ordinances are the formal records of the public will as expressed by these legislative bodies. Presidents, governors, mayors, and other executive officials constitute the channels through which this legislation is put into effect, while the courts uphold their hands by providing the sanction of enforcement.

THE AGENCY OF PUBLIC ACTION.

Government, accordingly, embraces three broad functions: namely, the making of laws, the administration of laws, and the enforcement of laws. Laws embody the mind of the people's representatives on matters of public policy, declaring what shall be done and what shall not be done. But laws are not self-starting devices; they have no momentum of their own. Hence administrators are vested with the function of putting the laws into operation. The vast majority of governmental officers are engaged in this work. And when anyone shows a reluctance to obey the laws it is the courts that provide the machinery of enforcement. Legislative, executive, and judicial,

ITS BROAD SCOPE.

therefore, are the three great branches of government. The study of government is equally concerned with all of them.

Such a study has several purposes. The first is to secure an acquaintance with a highly important field of human activity. Government has become an all-pervading social enterprise. It reaches into all phases of the citizen's everyday life. For it is government that gives him his citizenship, protects him awake or asleep, guards his health, provides him with education, limits his hours of labor, and regulates his conduct in an ever-increasing variety of ways. There was a time, not so long ago, when government was looked upon as a passive factor in the common life. Its functions were deemed to be largely protective. It defended its people against foreign enemies and kept peace within the nation's borders. For the rest it was supposed to laissez-faire, to let alone. But that concept of government, which served well enough in earlier days, is wholly unsuited to the complexities of modern industrial civilization. It has broken down in the face of a thousand demands from the people for all sorts of new governmental service ranging from the guarantee of bank deposits to the enforcement of collective bargaining in labor disputes.

WHY STUDY THIS SUBJECT?

THE STUDY OF GOVERNMENT AS A MEANS OF GAINING AN ACQUAINTANCE WITH A GREAT DOMAIN OF HUMAN ACTIVITY.

So today one should not think of government as an agency whose function is mainly to protect and restrict. In normal times the civil employees of the nation outnumber the army and navy twice over. Their work covers a very wide range, but much of it is intended to promote and construct, to encourage and stimulate, rather than to prevent or prohibit. Thus government has ceased to be a political agency alone and has developed into an economic and social force of tremendous power.

In this sense government has become one of our great American industries. It engages the full time of over three million people. One person in every twelve adults is on a government pay roll, national, state, or local. This huge army of public employees includes not only congressmen, judges, governors, mayors, and so forth but many thousands of postmen, policemen, and school teachers. Government also absorbs the part-time energies of a great many more persons in a nonofficial capacity — if one includes members of party committees, lobbyists and legislative agents, lawyers who appear before the courts, and politicians of every stripe.

EXTENT OF THIS ACTIVITY.

Government is also a great industry in the sense that it spends vast amounts of money. The combined expenditures of the American national, state, and local governments during certain years preceding the outbreak

of World War II totaled at least twelve billion dollars annually. With the return of peace these expenditures are likely to reach a much higher figure. Indeed the interest charge on the federal debt alone, assuming the interest rate remains relatively low (2½ per cent), may require an annual appropriation of close to seven billion dollars. This, of course, must be raised by taxation, in addition to all the other costs of government. A government has no alternative if it desires to retain its solvency and maintain its credit. During World War II taxes came close to taking thirty-five cents of every dollar of national income. After the war taxes will probably continue to take about twenty-five cents of every dollar of national income; they may take even more if the volume of national income shrinks. Surely an enterprise which takes so heavy a toll from the earnings of the people ought to receive careful scrutiny on the part of those who contribute the money. Government should be studied, therefore, because of its intimate relationship to the pocketbook of every citizen. In this connection it is well to bear in mind that it is not merely the direct taxpayer who defrays the cost of government. Everyone is an indirect taxpayer and hence contributes to it in the cost of living.

WHAT IT COSTS.

A second reason for the study of government is its value as a form of training in the art of observing and evaluating social facts, weighing arguments and detecting flaws in them, forming intelligent opinions on public questions, and doing various other things which every citizen in a democracy is supposed to do but very often does not. The art of understanding a political problem does not come by intuition. It has to be acquired, and the only way of acquiring it is by study and practice. The data of political science are rarely exact, and hence have to be handled with discrimination. For if they are handled loosely they lead to false conclusions.

THE STUDY OF GOVERNMENT AS A FORM OF TRAINING IN THE APPRAISAL OF FACTS AND THE WEIGHING OF ARGUMENTS.

Two and two do not always make four in politics. They may make 22. It all depends on the way you set the figures up. In other words the organization and operations of a government are not for the most part conducted on a basis of what is logical or rational. Government is an affair of human contrivance. As such it must reckon with the limitations of human nature. It rests on the caprice, as well as on the consent, of the governed. It is guided by human emotion to an even greater extent than by human reason. Hence the factors which influence the operations of a government are to a considerable degree uncertain, variable, and incapable of precise measurement.

Now it is well that somewhere in the process of education there should

be opportunity for training in the appraisal of these emotional forces.

THE ART OF FORMING SOUND OPINIONS.

In mathematics and in the natural sciences we deal with quantities and forces which can be accurately computed. The student of physics or chemistry learns that a certain cause or combination of causes will produce a given result. There are no emotional factors to be considered. So with the student of languages and literature. He discovers that certain grammatical forms must be used to build correct sentences; he deals with rules of grammar which are absolute and with principles of composition which are generally agreed upon.

But the study of government is not a matter of learning formulas and applying them. One is expected, above all things, to avoid formulas. It is a matter of detecting tendencies and sensing the interplay of popular inclinations. In the study of government it is rarely possible to proceed directly from cause to consequence, or to trace a consequence with certainty back to its cause. Results are usually brought about by the interaction of several causes and it is by no means easy to determine just how much each has contributed to the outcome.

This does not mean, of course, that there are no recognized principles or laws in political science as in the natural sciences. There must be laws,

THE SEPARATION OF KNOWLEDGE FROM SUPERSTITION.

or fundamental forces, in politics, for laws are the most universal of all phenomena. This universe is governed by laws, and man is part of the universe. Slowly we learn what these laws are. We have biblical assurance that "the wind bloweth where it listeth," but the meteorologist of today knows that it does nothing of the kind. It blows from a high-pressure to a low-pressure atmospheric area, always and everywhere — thus obeying a fundamental law. Once upon a time it was the universal belief that epidemics of disease were scourges sent by the gods. Everyone who has read Homer's *Iliad*, for example, will recall how the sun-god in anger raised his terrible bow, and with every twang of the bowstring sent brave men to their death by pestilence while their comrades offered prayers and sacrifices to propitiate the enraged deity. Today we do not offer sacrifices to the sun-god, but send health experts to find the major routes of infection.

So in political science there are processes and tendencies which partake

THE CYCLE OF RADICALISM AND REACTION.

of the character of natural laws. Every student of history has, for example, noted the regularity with which radicalism and reaction in government have followed on each other's heels throughout the ages.

> This is the moral of all human tales:
> 'Tis but the same rehearsal of the past,
> First Freedom, and then Glory — when that fails,
> Wealth, vice, corruption — barbarism at last!
> And History, with all her volumes vast,
> Hath but one page.

The road back from Freedom and Glory does not always descend to Vice and Barbarism, as Lord Byron suggests, but the fairly regular alternation of prosperity and depression, conservatism and liberalism, high political ideals and low, democracy and dictatorship, militarism and pacifism — this alternation is one of history's outstanding phenomena. And it can hardly be the outcome of chance, or even of human perversity. May it not be that many of our political vicissitudes are merely the workings out of forces which mankind does not yet sense or understand? Is it possible that we are still being guided, in the realm of government, too largely by formulas and superstitions which have no rational basis?

THE NATURE OF POLITICAL PRINCIPLES.

It may be so, although the principles which government obeys (if there are such) can never be so definite as are those of physics or chemistry because of the emotional factors which are so largely involved. Yet one should not lay too much stress upon the eccentricities of political action due to the human equation, for human nature is after all a reasonably stabilized affair. We recognize this in the saying that it is the same the world over. Men and women, in the mass, respond to the same stimulus in much the same way everywhere. The political action and attitude of a single voter cannot easily be forecast, but the action and attitude of a million voters can be predicted with reasonable accuracy when all the discoverable forces are assembled and impartially weighed.

CAN THEY BE EMBODIED INTO A SCIENCE?

The study of government can be pursued in a scientific way even though its principles are not always of universal application. The weather displays strange vagaries at times and fails to perform as predicted; yet we have a science of meteorology. The eccentricities of public opinion are no more striking than are those of the lower atmosphere. The average citizen is too much given to the habit of regarding his government as something that functions according to neither rhyme nor reason: a huge network of laws and regulations, personalities and activities, which possesses very little coherence and is guided by the opportunism of partisan advantage. He is inclined to look upon politics as neither a science nor an art but

merely as a game, played mostly in evasion of what are supposed to be the rules. That point of view is unjust to an enterprise which, when one considers the magnitude of its tasks, has maintained a high level of efficiency.

A FEW RECOGNIZED PRINCIPLES OF POLITICAL SCIENCE.

There are certain principles of government upon which virtually all students of the subject are agreed — enough, perhaps, to form the nucleus of a science. Hardly anyone, for example, now disputes the proposition that if you desire expert skill in any administrative office you should make the office appointive, not elective. Likewise there is general agreement on the principle that administrative responsibility should be centralized, not diffused. Every government should plan its financial operations annually and embody this plan in a budget. Judges should have reasonable security of tenure. Taxes should not be levied without specific authorization by law. Many other examples could be given. The science of government develops certain principles and the art of government consists in successfully applying them.

OBSTACLES TO IMPARTIAL STUDY IN THIS FIELD.

Of course the greatest obstacle to the study of government in a scientific spirit is the extreme difficulty of maintaining an impartial attitude. This results from the content of the subject, from the nature of the questions which arise, and from the ease with which the same data can be differently interpreted. Political issues come very close to human emotions and inherited prejudices. There are few individuals who can calmly, dispassionately, and in a completely neutral spirit undertake an analysis of public ownership, unemployment insurance, old-age pensions, collective bargaining, price control, compulsory military service, federal aid to education in the states, birth control, compulsory arbitration, collective security, or international organization for the preservation of peace. Opinions on such matters are not reached with the intellectual neutrality which a natural scientist displays towards his problems. There is nothing in the human emotions which impels a chemist to favor alkalis as against acids. He bears no inherited prejudice against the proposition that nature abhors a vacuum. He merely sets it down as one of the things that has to be.

THE INHERENT PREJUDICES OF THE INDIVIDUAL.

But every student of American government has been born and brought up in a sectional, social, economic, religious, and political environment, the influences of which cling to him through life. His observations and judgments will be affected by this fact, no matter how honestly he may strive to submerge his inherent sympathies and aversions. Hence it is virtually impossible for any citizen to give a thoroughly unbiased

portrayal of the structure and workings of his own government. The best book ever written on the government of the United States is the work of an Englishman; the best book ever written on the government of England is the work of an American.[1] This is significant but not surprising. It points to the advantages of emotional detachment on the part of those who are on the outside.

THE ATMOSPHERE OF BIAS.

Nor is the difficulty merely one of overcoming partialities that have been inherited. Every citizen lives his whole life in an atmosphere that is surcharged with partisanship. He is deluged with propaganda, adroitly garbed as sound information. He is in daily contact with people who look through colored glasses (rose or blue) upon every act of the public authorities. His eyes are requisitioned daily by the newspapers and his ears by the radio. He is importuned for support by politicians who believe that the science of government originated at the last presidential election and that the art of government is an ironclad monopoly in the hands of one political party. All this befogs the atmosphere of scientific inquiry. It is rather humiliating for any citizen to profess an uncertain opinion on a political issue when everybody else seems to have reached a confident one.

THE CITIZEN'S READINESS TO FORM SNAP JUDGMENTS.

It is perhaps worth remarking that the average citizen assumes no such cocksureness of opinion in fields of knowledge other than public affairs. If you ask him, for example, what is meant by polarized light, he will refer you to a scientist for the answer. If you ask him whether courts of equity should have power to issue writs of mandamus, he will explain that he is not a lawyer. In such things he will exhibit a decent respect for the limitations of his own competence. But turn to the realm of government and ask him whether the national tax system ought to be revised and how; whether the powers of the Supreme Court ought to be curbed; whether the national labor relations law is a success or a failure; whether the federal government should adopt a sales tax, or reduce the tariff; whether we should have health insurance and who should pay for it — ask the plain citizen any of these questions and he will rarely hesitate to give you a definite opinion straight from a closed mind. He will not reply that he has made no study of taxation, jurisprudence, industrial economics, national finance, or social policy — which would be the proper answer in most instances.

There is only one way to correct this situation; that is by the spread of properly organized instruction in the schools and colleges. There the

[1] James Bryce, *The American Commonwealth* and A. Lawrence Lowell, *The Government of England*.

oncoming citizenry can be brought to realize that facts, however awkward, are of controlling importance in government as in everything else; that the same facts may be subjected to differences in interpretation; that there are at least two sides to every political question, and sometimes more than two; that it takes patience and industry to get to the bottom of tough problems; that a scientific neutrality on any issue of political policy or social conduct is extremely hard to maintain; and that problems of government are inherently as difficult as are those of science or engineering. They demand the same concentration of thought. They cannot be understood except by the same process of diligent study. If the problems of government were as simple as most citizens seem to think they are, we should have found solutions for them a long time ago.

CAN THIS PROPENSITY BE CORRECTED?

Glance through the index of this book, or any other book, on American government. Administration, agriculture, ambassadors, anarchism, appointments, appropriations, assessments, attainder, ballots, banks, bankruptcy, bimetallism, bonds, boroughs, bosses, budgets, cabinets, campaign funds, carpetbaggers, caucuses, censorship, charters, child labor, citizenship, city planning, civil service, coinage, common law, constitutions, contracts, copyrights, credit, courts — and so on for a dozen or more closely packed pages. These words, every one of them, point to policies and problems which are very far from simple in their implications. Sometimes the idea involved in one of these terms is simple enough, but in the domain of government an idea is sometimes so greatly at variance with the actualities that the one becomes almost the negation of the other. This means that the student of government must not let himself be misled by the ostensible relation between things but should look below the surface and scrutinize facts as with a microscope, for the most important political forces are sometimes the ones with the least visibility.

KNOWLEDGE OF THE FACTS AS THE BASIS OF OPINION-FORMING.

There is a third reason for the study of government. It is to be found in the relation of citizenship to patriotism. A free government demands obedience from its people, yet there can be no intelligent obedience unless the citizen knows what it is that he obeys. A government requires the cooperation of its people, but there can be no effective cooperation unless it be based upon understanding. A government feels itself entitled to the confidence and respect of the people, but no genuine political confidence can ever be founded on civic ignorance. Good intentions do not suffice to make a good citizen; and in a free government there is no synthetic

THE STUDY OF GOVERNMENT AS AN AID TO CONSTRUCTIVE CITIZENSHIP.

substitute for the national unity which rests upon a wise, informed, and judiciously tolerant citizenry.

When men and women pledge allegiance to the flag, and to the Republic for which it stands, they should at least know what kind of republic it stands for. When they repeat their formula of "one nation, indivisible, with liberty and justice for all," they should at least have some general idea as to how it came to be one nation, why it has remained indivisible, how liberty was achieved, by what means it is preserved, and through what instrumentalities of government the ideal of evenhanded justice is sought. When the citizen, on taking public office, swears to uphold the Constitution of the United States he may reasonably be presumed to have read it; but this oath has been taken by many a man who has not.

THE CITIZEN IN HIS SOVEREIGN CAPACITY.

The American philosophy of government endows the citizen with ultimate sovereignty. It places in his hands the power to determine what kind of government he shall have. It is for him to say, directly or through his elected representatives, what shall be enacted in the constitutions and laws of the nation and the states, what taxes shall be imposed, what expenditures made, and what policies pursued. This is a vast responsibility. It is a responsibility that cannot properly be met by the citizen unless he has at least a general knowledge of what his government is and what it is supposed to do. The promotion of an intelligent and responsible civic interest, therefore, is the third object in the study of government.

HOW IMPROVEMENT COMES.

The Constitution and the government of the United States are entitled to respect. The more study one gives to them, the greater is that respect likely to be. Not only is it likely to be greater, but it will rest on a surer foundation. This is not to suggest, however, that there are no flaws in the nation's fundamental law or in its frame of government. There are plenty in both. And government, whether in the nation, the states, or the local areas, can only be improved by changing it. What man does not transform for the better, time will alter for the worse. A constructive citizen, accordingly, is one who knows enough about his government to discern its weak spots and who deems it his obligation to help strengthen them, to the end that his government may more fully command the obedience and respect of the people. It is only by increasing the number of such men and women that either the Constitution or the government of the United States can be made to endure.

Now a word as to the methods of study. In approaching this subject one of the first essentials is to get rid of the notion that the government

of the American people is a simple affair, easy to understand without concentrated effort. It is, in fact, anything but simple. It is the most complicated government on earth, and the most difficult to understand. True enough, one can imbibe a smattering of it without systematic study and every native-born American does so as he goes along. But the information that he gets in this way is fragmentary, often only half accurate, and always tinged with partisanship. In this field, as in so many others, a little knowledge often proves a dangerous thing, for men act upon it without realizing its inadequacy.

METHODS OF STUDY: 1. THE PROPER APPROACH.

Government as a science is not an easy subject. To become even reasonably conversant with the structure and functions of American government in nation, state, and municipality is an undertaking of larger proportions than most people imagine. To secure a clear picture of the relations which exist between the various organs of government, the limitations under which they work, and the forms of pressure that are put upon them — let no one imagine that this can be achieved with less intellectual effort than is required for the study of higher algebra or solid geometry. There is only one way in which the study of government can be made easy for the average man or woman: namely, by omitting or glossing over everything that is difficult. If, therefore, the reader of this book finds the subject easy, he may make up his mind to one of two things — either that he has an uncommon genius for the study of public affairs or that he is missing most of the points.

A RECOGNITION THAT THE SUBJECT IS A DIFFICULT ONE.

The study of a government involves not only careful reading but study and reflection as well. It should be done with pen in hand and a notebook on the table. Good note-taking is a real accomplishment. Many young men and women go all the way through college without becoming even moderately proficient at it. What the student should aim at is not a mere condensation of the reading, but a recasting of the principal ideas in his own language, adapted to his own point of view. He should devise, if he can, an arrangement of the material which is clearer and more logical than the one followed in the book. It can often be done — and there is nothing more serviceable in the clarification of any subject. Careful and orderly note-taking, moreover, affords opportunity for practice in the art of concise writing, and the mastery of this useful art is largely a matter of practice. Hence it is better to write one page of thoughtful summary than to dash off several pages of unpunctuated scrawl and call it a day.

2. NOTE-TAKING.

The purpose of study is to incite one's mind into self-propelled activity.

Education ought to stimulate one's intellectual curiosity. It is not of enduring value unless it does. The study of government, in particular, should develop this habit of self-questioning. Many political institutions and practices continue to exist for the mere reason that they have become traditional. They suggest a challenging of their merits. One man's opinion on most political questions is about as good as another's; provided, however, that both opinions are based on equal thoroughness of study. On the other hand, no man has a moral right to hold an opinion without a reason for it, a reason that is valid to his own mind. But if he has such a reason his own opinion is more useful, in the educational process, than a ready-made one borrowed from somebody's book.

3. THE QUESTIONING ATTITUDE.

Hence it is better to maintain a scrutinizing attitude in the study of government than to be content with the memorizing of facts and the unquestioning acceptance of traditional principles. On the other hand there is no particular virtue in being a congenital iconoclast. What is, for the most part, is right. If it were not right, it would not exist. Remember that the law of natural selection is at work among governmental institutions and methods. It eliminates the unfit, although rather slowly at times. Hence the benefit of the doubt, when one is in doubt, should be given to what we have, rather than to something that might with some possible advantage be put in its place. This is not to argue against the practice of trying experiments in government but only to suggest that they should not be tried unless there are reasonable prospects of success, for when experiments fail there is a weakening of the people's confidence in their government. Then they call for a general reconstruction, with results that are sometimes disastrous. Dictatorships have, on more than one occasion, grown out of unwise and unsuccessful experimentation by governments, especially in the domain of economic affairs. The history of Europe during the past twenty years is replete with illustrations of this.

4. THE AVOIDANCE OF UNDUE ICONOCLASM.

Government, as Emerson once said, is "the greatest science and service of mankind." The world is giving more thought to it nowadays than ever before. And rightly so, for never have the foundations of democratic government been so violently assailed. Man's rulership over nature has become more successful year by year; but man's rulership over man is making no such advance. The human race has been far more successful in controlling the relations between man and his environment than in establishing satisfactory relations between man and his fellow men. Surely there is need for

THE GREATEST OF ALL THE SCIENCES.

thought in a situation where human progress is being made so rapidly in all the sciences except the one that ought to be the most important.

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CHAPTER II

THE BACKGROUND AND BEGINNINGS OF AMERICAN GOVERNMENT

It is not the least debt that we owe unto history that it hath made us acquainted with our dead ancestors; and out of the depth and darkness of the earth delivered us their memory and fame. — *Sir Walter Raleigh.*

WHY AMERICAN GOVERNMENT DESERVES SPECIAL STUDY.

The government of the United States deserves to be studied for a number of reasons. For one thing it is responsible for the welfare of more than 130,000,000 people. It represents one of the oldest, most elaborate, and most successful efforts to combine central authority with local self-government. It is true, of course, that there were federal governments long before the Constitution of the United States was framed: the Achaean League in ancient Greece, for example. But until the rise of the American Republic there was a world-wide belief that the federal form of government was suitable for small states only, and that it was inevitably a weak form of government because it parceled power into too many hands. Both philosophers and statesmen shared the general conviction that no federalism on a large scale could long endure. A house divided within itself could not stand when the rains descended and the floods came — when internal dissension and the shock of war put its stability to the test. Down to the close of the eighteenth century the world believed that the security of life, liberty, and property demanded the centralization of governmental powers in relatively few hands.

A CONSPICUOUS EXPERIMENT IN FEDERAL DEMOCRACY.

But in due course the United States proved the fallacy of this conviction. America, during the nineteenth century, demonstrated to the world that federalism did not necessarily mean weak government, but was quite reconcilable with a strong national administration. American federalism survived the strain and stress of the Civil War, spread from the thirteen states to forty-eight, and proved itself amenable to both the spirit and practice of democracy.[1] American governmental experience has

[1] When the Civil War began, many Europeans looked upon this struggle as the logical outcome of a futile attempt to keep federalism functioning on a large scale. The English his-

proved to the world that a republican system, organized on a federal basis, can serve the political needs of a vast population scattered over a whole half continent. It has demonstrated anew the truth that a federal system of government, if properly organized, can meet emergencies as well as any other form of government, and perhaps better.

A SYSTEM THAT HAS DEVELOPED BY THE PROCESS OF TRIAL, ERROR, AND CORRECTION.

For more than a hundred years the United States has been serving as a great laboratory of political experimentation. In the nation, in the several states, and in the thousands of local areas, almost every conceivable experiment in the art of ruling people has been given a trial. By this process of experimentation we have developed some of the best, and some of the worst, governmental procedures that have been evolved anywhere. The American system of government is largely a homemade product. It is not something planned and created in accordance with an ideology, as totalitarian governments are, but a continually changing organism which has been matured by the unending process of trial, error, and correction. This means, incidentally, that no one can really understand American government without knowing American history, at least in a general way. For example, how can one talk intelligently about the present-day powers of the President, or of Congress, without some knowledge of the way in which these powers have grown, step by step, during the past hundred and fifty years, with each accretion made possible by the special needs or circumstances of its time?

THE AMERICAN REVOLUTION, A CLIMAX, NOT A STARTING POINT.

The federal Constitution is, in a sense, the starting point. With its adoption the evolution of American federation got vigorously under way; and before long a half continent was welded into a single nation. For this accomplishment, the main credit has usually been given to the group of men who sweltered through the summer of 1787 at Philadelphia to produce the Constitution of the United States, and it is true that a great deal of credit belongs to them. But national unity, with all that it implied, was not created out of hand by these makers of the Constitution. One must not forget that the thirteen separate colonies had fought a war unitedly, won their independence together, created a makeshift confederation, and learned to feel a community of interest — all this before the men who devised the Constitution began their work. They had been traveling along the inevitable road to union. They were ripe for some such plan as the one which they finally adopted in 1787–1788.

torian, Edward Freeman, published in 1863 a *History of Federal Government from the Foundation of the Achaean League to the Disruption of the United States*. It was his belief that, no matter what the outcome of the Civil War, the old federal union could never be revived.

So the work which was done by the Philadelphia Convention should be looked upon as the consolidating and strengthening of what had already been gained by the thirteen newly independent commonwealths rather than as the launching of a new set of political ideals embodied in a new constitution. The new Constitution was largely the expression of old ideals.

IT DID NOT BREAK CONTINUITY.

In a broad sense, the American Revolution was not a revolution at all. It was not a complete overturn like the French Revolution of the eighteenth century, or the Russian Revolution in the twentieth; it did not sweep away fundamental institutions, or bring in a new set of political ideals, or shift the weight of political power from one class among the people to another. It merely changed the resting place of sovereignty. The sovereign power had hitherto been vested in the British crown and had been exercised through instructions sent by the home authorities to the colonial governors. Henceforth it was to rest in the people of the thirteen commonwealths, to be exercised by them through their own constitutions and laws. In the continuity of American political institutions, therefore, the Revolution marks a break of no great violence. Nevertheless, it did swing political evolution into a new channel and greatly speeded up the march of democracy in the New World.[1]

HISTORY HAS FEW SHARP BREAKS IN IT.

It is natural that writers who deal with revolutions should be tempted to exaggerate their revolutionary aspects. This has been true of the American Revolution, and it has induced historians to make a sharp break between two periods of American history, with the Revolution as the dividing line. They have written as though the political institutions of the later period owed nothing, or at any rate very little, to those of the earlier. But the fact is that American history, during more than three centuries, has very few sharp breaks in it. The law of continuity runs through it like the reinforcing rods of a concrete wall.[2] The Revolution retained far more than it swept away. There are very few political institutions whose birth date can be definitely set down as A.D. 1776. Elections, trial by jury, freedom from arbitrary arrest, freedom of speech — they are all much older. American democracy did not begin with the Declaration of Independence, but that great and courageous document gave it new impetus.

To find the true foundations of the American political system one must look beyond the Constitution, beyond the Declaration of 1776,

[1] The extent to which the Revolution affected the general life of the people is set forth in J. F. Jameson, *The American Revolution Considered as a Social Movement* (Princeton, 1926).

[2] For an interesting discussion of the "laws" of history, including the "law of continuity," see E. P. Cheyney, *Law in History* (New York, 1927), especially pp. 12–15.

even beyond the coming of the Mayflower to Plymouth. The principles of civil liberty on which American government rests had their birth on the soil of the Old World. Their beginnings go back to the days of the Saxon folkmote and the Curia Regis of Norman England. The rights of free citizens, as established by Magna Carta, the Bill of Rights, the Habeas Corpus Act, and by the whole fabric of the common law in England, were the heritage of the American colonists from the outset. They brought these privileges across the Atlantic with them, just as they did the English language. The right to a share in the making of laws, the right of self-taxation, the right to trial by jury, the right of petition, the right of assembly, the right of all men to be dealt with equally before the law — no one believes that any of these civil rights originated in America. They have traditionally belonged to the whole English-speaking race for nearly half a millennium. The American Revolution preserved them at a time when they were in danger of being trampled underfoot; and the new American constitutions, both state and national, ensured their safety for the future.

WHERE AMERICAN POLITICAL DEVELOPMENT BEGINS.

Observe the landmarks which stand out in the course of this progress, all the way from the earliest migrations to the attainment of national unity. The thirteen colonies which formed the nucleus of the United States were themselves the outgrowth of small settlements planted along the Atlantic seaboard during the course of the seventeenth century. When the first settlers came, it was not with the idea of founding new states; so they were organized as trading companies, with company charters. Soon, however, the colonists found that something more than this was necessary. Hence the company charters gave way in some cases to colony charters or embryo constitutions; in other cases the people went ahead without formal authority, establishing their own local and general governments.

TRADING COMPANIES AND COLONIAL CHARTERS.

But the lines of this political development were not everywhere parallel. Naturally so, because in point of time there was a wide spread between the founding of the first colony (Virginia) in 1607 and the last one (Georgia) in 1732. Much had happened in the mother country during this interval. The arrangements under which the different colonies were founded also varied considerably. Maryland and Pennsylvania, for example, were established by individuals, not by trading companies. Differences in the occupations of the people also led to departures from uniformity in the systems of government which were set up by these various communities.

On the surface, accordingly, there was a great deal of variety in the government of the American colonies. Some had charters, some did not. In some the basic area of local government was the county, in others the town. But these differences in organization and procedure were not of fundamental consequence. Of vastly greater importance is the fact that all the colonies were fundamentally alike in their love of civil liberty and their adherence to the institutions of free government. The differences among them are of slight account when weighed against the broad and deep resemblances. For it should be remembered that all these colonies had been founded by Englishmen or had passed under English control. The bond of kinship encircled them all. They possessed, moreover, a geographical unity in that they occupied a virtually unbroken strip of territory extending from Georgia to Maine and from the Appalachians to the sea. The inhabitants were overwhelmingly of the Protestant faith and nearly all claimed English as their mother tongue. The common law of England formed the basis of the legal system. Finally, the people adhered to a common political philosophy. Their general conception of sound rulership was the system of representation which had been developed by their forefathers in England. Thus there was substantial unity in language, in law, and in political conceptions — and in all ages these have been the great magnets that draw neighboring communities together.

COLONIAL DIVERSITY AND KINSHIP.

The basis of colonial government in each colony was the supremacy of the crown. Explorers and traders went out under royal auspices; they took possession of new lands in the name of the crown, and the territories which they gained became royal property. This occurred because the English constitution made no provision for the parliamentary acquisition and government of territories outside the realm. It gave parliament no jurisdiction beyond the confines of the British Isles. So the first company charters were obtained from the crown, which also gave colonial charters to replace these earlier grants.

ROYAL VERSUS PARLIAMENTARY POWER AS THE BASIS OF COLONIAL GOVERNMENT.

As a matter of constitutional theory, therefore, the crown was supreme in the colonies even though limited by the growing control of parliament at home. The English parliament granted no colonial charters, appointed no governors, and rarely passed laws that extended to the colonies. It seldom interfered with the process of colonial administration; and whenever it did, there were vigorous protests from America that it was exceeding its powers.

"America is not part of the dominions of England," argued Benjamin Franklin, "but part of the king's dominions." "All members of the

British Empire are distinct states, independent of each other but under the same sovereign," wrote James Wilson, one of the makers of the Constitution. This point of view was accepted by virtually all the colonial leaders. The colonies, they held, were equal members with each other and with England in a political aggregation which had a single executive (the crown), but each unit of which was entitled to its own legislature. That explains why the colonists were willing to give allegiance to the crown, but unwilling to give local jurisdiction to a parliament across the seas. It explains also why they took the oath of allegiance, but resisted the acts of parliament. There was no inconsistency in their so doing. Exactly the same attitude is assumed by the British dominions such as Canada and Australia today. The Statute of Westminster, passed by the British parliament in 1931, formally conceded the principle that allegiance to the crown does not carry with it any legislative control over the dominions.

HOW THE COLONISTS VIEWED IT.

The English crown, of course, did not exercise its powers directly. It controlled the American colonies through various administrative agencies. Broadly speaking, it left to the Board of Trade [1] all matters relating to colonial commerce, and during the eighteenth century the general supervision of colonial government as well. But the crown could take any matter directly into its own hands and sometimes did so. In any event, all instructions went to the colonial governors in the name of the crown, and the crown could disallow any law passed by a colonial legislature. This power of royal disallowance was frequently used, but the colonial assemblies sometimes managed to get around it by reenacting the disallowed law.

HOW THE CROWN EXERTED ITS CONTROL.

Let us take a glance at the American political system as it existed before 1776. This is desirable because the states of the Union, and even the national government, still retain many attributes that came to them from these early governments along the Atlantic seaboard. The state governor of today, for example, is the lengthened shadow of the colonial governor, for each of the thirteen colonies had a governor as its chief executive. In the eight royal provinces he was appointed by the crown; in the others

STRUCTURE OF COLONIAL GOVERNMENT — THE GOVERNOR.

[1] Its full title was the "Board of Commissioners for Trade and Plantations." It was organized in 1696 and originally had eight members. The commissioners were commonly called the Lords of Trade although most of them were commoners. A general statement of the Board's functions may be found in Edward Channing, *History of the United States*, Vol. II (1908), pp. 231–235. The relations between the colonies and the home authorities are described in George L. Beer, *Origins of the British Colonial System, 1578–1660* (New York, 1922) and his *British Colonial Policy, 1754–1765* (New York, 1922); also in L. W. Larabee, *Royal Government in America* (New Haven, 1930).

he was either elected by the people (in the two charter colonies) or named by the proprietor (in the three proprietary colonies). The position of the colonial governor was something like that of the king at home; he summoned the colonial assembly and could dissolve it when he chose. In some respects his authority was wider than that of the crown, for he had the right to veto the assembly's acts, whereas in England the crown had virtually lost this power in relation to acts of parliament. The appointing authority of the colonial governor was also extensive, and he was the head of the militia in each of the colonies.

Historians have been rather hard on these colonial governors, and it is true that they were not, for the most part, men of conspicuous ability or tact. Moreover, they held an anomalous office which no man could ever hope to fill acceptably — a double responsibility, one half of which was often in conflict with the other. On the one hand, the colonial governor was the overseas representative of the crown. In this capacity he was expected to carry out specific orders and instructions issued from London by kings and ministers who knew little or nothing about colonial conditions. On the other hand, he was the head of the local administration, responsible for the general oversight of colonial affairs, yet dependent upon the colonial legislature for money with which to carry on the administration. Thus the colonial governor had to serve two masters; one gave him his orders, the other gave him his pay. And there is good authority for the proposition that "no man can serve two masters"; at any rate, no man can serve two masters and hope that both will be equally pleased with his work.

DIFFICULTIES OF HIS POSITION.

It would be inappropriate to set down in these pages a list of the principal powers exercised by the colonial governor, were it not for the fact that many of them have continued to be vested in the chief executive of the states and the nation. The governor summoned the colonial legislature and could veto laws passed by it. He could also dissolve it at will, a power which no state governor possesses. Likewise he enforced the laws, made various appointments, and was responsible for the colonial defense. He represented his colony in its relations with the home government and with other colonies. He had the power of pardon. He was head of the colonial militia. He issued charters to cities. But in the exercise of all these powers he was somewhat restrained by the assembly's control of the colonial treasury. There was little that any governor could do without funds, and he had no way of getting money unless the assembly voted it. He could not draw his own salary, in fact, until the representatives of the people had authorized it.

HIS GENERAL POWERS AND THE LIMITATIONS UPON THEM.

In each colony there was also a legislature, usually of two branches. The lower chamber, or assembly, was elected by the people, but each colony had its own qualifications for voting, the ownership of real or personal property being nearly always required, with religious tests sometimes imposed as well.[1] But, on the whole, the suffrage was more democratic than in England. The difficulties of travel in the colonies were so great, however, that only a small fraction of those who were entitled to vote usually took part in the elections. The proportion was higher in the New England colonies, where members of the legislature were elected by towns, than in the middle and southern colonies where they were chosen by counties.

THE COLONIAL LEGISLATURES.

In all except three of the colonies the legislature also had an upper chamber. These upper chambers were primarily executive bodies; in most cases the members were named either by the crown on the recommendation of the royal governor, or by the proprietor. In addition to being the upper house of the colonial legislature, this body served as the governor's council, advising him and sometimes controlling his appointments. Its principal functions, in fact, were executive and judicial rather than legislative. Here originated, by the way, our present-day practice of giving executive duties to the upper chamber of the state legislature — for example, the power to confirm the governor's appointments.

THE UPPER CHAMBER IN THESE LEGISLATURES.

In general, the colonial legislatures controlled the purse strings and claimed the sole right to legislate on any matter which concerned the colony's internal affairs. They did not deny the governor's right of veto, but they objected to having their colonial laws disallowed by the authorities in London.[2] The colonial legislatures had full power over the levying of taxes, and this was the chief source of their influence upon executive action. Holding the purse strings, they held the whip hand. Moreover, it is a general principle of government that when you once set up an elective chamber, its powers are bound to grow, no matter what charters or constitutions may say. That is the course which political progress took in colonial America. The powers of the colonial legislatures were growing steadily when the eve of the Revolution approached.

THE LEGISLATURE'S AUTHORITY.

In all the colonies the groundwork of jurisprudence was the common law of England. It was not established in the colonies by any definite enactment, but like other Anglo-Saxon institutions it migrated with

[1] For a full survey see A. E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies* (Philadelphia, 1905), and Kirk H. Porter, *History of Suffrage in the United States* (Chicago, 1918).

[2] E. B. Russell, *The Review of American Colonial Legislation by the King in Council* (New York, 1915).

the flag. As for the judicial organization, some differences existed among the several colonies, but here again the general lines were uniform. All of the colonies had local courts, intermediate courts, and a highest court, which in some cases consisted of the governor and his council, but which in others was a separate body made up of regularly appointed judges. From these highest colonial courts, appeals might be carried to England where they were decided by the Privy Council. The Privy Council was not a court in the ordinary sense; its right to confirm or reject the judgments of the colonial courts was merely one phase of its authority to advise the king, who in turn was the final arbiter in all matters affecting the colonies. Appeals to the Privy Council were not frequent until after 1750, when they steadily became more common. All the colonial courts followed English legal procedure; the right of trial by jury and the other privileges which Blackstone calls "the liberties of Englishmen" were everywhere given recognition. The colonists thus became schooled by actual experience in the doctrine that men had "unalienable rights."

LAW AND THE COLONIAL COURTS.

It was in the field of local government that the greatest diversity of governmental practices appeared. In the New England colonies the unit of local administration was the town, with its town meeting of citizens and its elective local officers. The town raised its own taxes and spent them, made its own bylaws, elected its own local officers, and sent its representative each year to the colonial legislature. It was a miniature republic, rarely interfered with from above. This was practicable because the New England colonists for the most part lived close together, on relatively small farms.

LOCAL GOVERNMENT: 1. IN NEW ENGLAND.

The southern colonies, on the other hand, established the county as their chief unit of local administration. They used this larger unit because the plantation system of agriculture caused the population to be more widely scattered. County officers, such as the sheriff and the coroner, were appointed by the governor, and there was no general meeting of the inhabitants to vote the taxes or to determine matters of local policy. As in the English counties of the day, much of the work was performed by "justices of the peace," who, despite their name, were administrative as well as judicial officers. They, also, were appointed by the governor.

2. IN THE SOUTHERN COLONIES.

Finally, in the middle colonies, particularly in New York and Pennsylvania, there was a mixed type of local government: a combination of the town and county systems, which bridged the gap between the extremes of New England and the South. Yet the differences in local government throughout the thirteen colonies

3. IN THE MIDDLE COLONIES.

were not greater than those which one can discover in that of the several states today. Such differences did not impair the political solidarity of the people. Everywhere the conditions favored democracy. A new country, remote from the social traditions of the Old World, a hardy population engaged in the grueling task of hewing homes out of a wilderness — the stage was all set for an era in which liberty, democracy, and union were to be achieved.

EARLY ATTEMPTS TO UNITE THE THIRTEEN COLONIES.

With such a general approach to uniformity in race, religion, language, and law, with such marked similarities in political organization and temperament, with common problems arising from the pressure of outside enemies, one might suppose that the various colonies would have drawn more closely together and that even before the Revolution they would have devised some form of federal union. It is true that there were some steps in this direction. As early as 1643, the four New England settlements of Plymouth, Massachusetts Bay, Connecticut, and New Haven united in a league of friendship, particularly for mutual support against Indian attacks, and arranged that each should send two delegates to a joint conference every year. But the existence of this league came to an end after the Indian dangers, against which it had been organized, had passed away. From time to time during the next hundred years, other leagues and unions were proposed. William Penn made such a suggestion in 1696, with a scheme of union under a royal commissioner and a congress composed of two deputies from each colony. But the clash of diverse interests always proved a stumbling block, and it required a serious common danger to impress on all the colonies their essential unity and their need of cooperation.

1. THE NEW ENGLAND CONFEDERATION (1643).

2. PENN'S PROPOSAL (1696).

Finally a proposal came from England. At the suggestion of the Lords of Trade, a congress was called at Albany in 1754, to form a confederation for mutual defense and especially to devise a plan for keeping the Iroquois Indians from joining with the French in Canada. At this gathering Benjamin Franklin brought forward a plan of union which the congress, after making some changes, adopted unanimously. Franklin's plan, commonly known as the Albany Plan of Union, contemplated a grand council or congress in which each colony would be represented on the basis of its financial contribution; this council to determine the means of common defense, the number of troops to be supplied by each colony, and the amount of money to be contributed by each. The crown was to appoint a president general, who should command the united forces and

3. BENJAMIN FRANKLIN AND THE ALBANY PLAN (1754).

have the spending of the money so raised.[1] But Franklin was ahead of his time; and, although the delegates at Albany approved his project, it was rejected by the colonial legislatures when it came before them for approval. Thus the Albany Plan came to naught, but it nevertheless rendered some service in paving the way for the First Continental Congress of the Revolutionary War.

WHY UNION WAS SO LONG DELAYED.

Why was it, in view of the manifest advantages of cooperation, that the thirteen colonies did not come into some sort of working federation long before the actual outbreak of troubles with England? In the first place, they were not equally exposed to attack by the Indians, the French, or the Spanish. Local jealousies afforded another reason. A failure to realize that, in a broad sense, all their interests were alike, was another. The home government, moreover, was never favorable to any scheme of union which would give the colonies a permanent solidarity of action in all matters. It was ready to have them join for the common defense, provided the carrying out of such plan was entrusted to officers sent out from England. In a word, the colonies never realized their essential unity until the acute controversy with the mother country made it clear to them.

SIGNIFICANCE OF THE DIFFERENCE.

The significant thing, after all, is this: In the colonies there was a public opinion, and on certain fundamental issues it was fairly well unified. The colonial assemblies were good reflectors of this public sentiment. They judged the colonial temper with remarkable accuracy. If parliament had done it as well, there might have been no Revolution. Intercolonial jealousies and differences of opinion related to minor questions. English statesmen foolishly assumed that because the colonies could not unite on small issues they would be unable to unify on larger ones. They were wrong, as the event proved; for when united action became urgent, the entire group of colonies forgot their differences and joined hands in a common front.

CAUSES OF THE REVOLUTION.

This is not the place to detail the events which led to the breach with England. It should be pointed out, however, that there was no general dissatisfaction with the *type* of government which existed in the various colonies. The Revolution did not come because the colonies wanted new charters or elective governors or manhood suffrage. Its underlying causes were economic; they concerned questions of trade and taxation. But once the spirit of resistance was aroused, it found new and broader grievances. The colonists soon

[1] The plan may be found in the *Writings of Benjamin Franklin* (ed. A. H. Smyth, 10 vols., New York, 1907), Vol. III, pp. 207–226; and William MacDonald, *Select Charters and Other Documents Illustrative of American History, 1606–1775* (New York, 1899), pp. 253–257.

came to a realization of the fact that democracy had been forging ahead more rapidly in the New World than at home; and the Declaration of Independence gave vigorous expression to various ideals of democracy which had originated in England but became more firmly rooted across the ocean.

THE ULTIMATE BREACH.

It was the events of 1773–1774, including the imposition of the new taxes and the action of parliament in suspending the charter of Massachusetts, that brought home to the colonies the urgent need for a united front. One of their number was in danger of having its liberties taken away: what of the other colonies, each in its turn? The danger was no longer confined to north or south; it was common to all. Hence the calling of the First Continental Congress, which met at Philadelphia in the autumn of 1774 with delegates present from all the colonies except Georgia. The object of this congress was to take counsel on what seemed to be a common peril. Its members adopted various resolutions addressed to the home authorities, pledged the cooperation of the various colonies in resistance to oppressive demands, and agreed that a similar congress should meet the following year.

FIRST CONTINENTAL CONGRESS (1774).

But events moved rapidly. Before the early summer of 1775, when this Second Continental Congress assembled, the situation had gone from bad to worse. The open clash of arms had come at Lexington, and the fate of Massachusetts seemed to be sealed unless the other colonies could quickly come to her aid. Accordingly, the Second Continental Congress appointed Washington to the chief command, called upon all the colonies for troops and supplies, and took upon itself the right to issue paper money as a means of helping to finance the armed resistance. These powers were usurped by the congress because of the necessities of the situation; they had no legal or constitutional basis. But their usurpation was sanctioned by the acquiescence of the people, and in the last analysis that is the most effective sanction that the actions of any public authority can have.

SECOND CONTINENTAL CONGRESS (1775).

THE CLASH OF ARMS.

All this gave rise to a very anomalous situation. The colonies were still subject to the king although in active resistance to the royal authority. They had assumed the attributes of sovereignty without formally severing their old allegiance. This situation, however, came to an end with the Declaration of Independence in 1776. By this pronouncement the colonies became states, each independent of the crown and politically independent of others. Such action made it desirable that the Continental

THE DECLARATION (1776) AND THE ARTICLES (1777).

Congress should rest on a legal basis with some definition of its powers and duties. So, in 1777, the Continental Congress sought to gain permanence and legality for itself by adopting certain "Articles of Confederation and Perpetual Union," a document which had been prepared by one of its committees. These Articles were then sent to the several states for ratification; meanwhile the Continental Congress went ahead with the conduct of the war.

By the provisions of the Articles, the thirteen states entered into a league of amity; but each state retained its sovereignty, freedom, and independence.[1] Every right not expressly delegated to the confederation remained with the states. The organ of the confederation was a congress made up of delegates from all the states, each state sending not fewer than two nor more than seven, but in any case having one vote only. The legal equality of all the states was thus recognized, although there were great differences among them in area and in population.

NATURE OF THE CONFEDERATION AND ITS CENTRAL ORGAN.

As for political authority, the congress of the new confederation was given very little. It was empowered to manage the war, handle foreign relations, and make peace. In order to continue and finish the war, it could call upon the several states for contributions of money or men; but it had no way of compelling them to respond. It was given various internal powers such as those of establishing a postal service and managing Indian affairs. With nine of the states assenting, it could fix the size of the military and naval forces, make treaties, vote a budget, borrow money, coin money, or issue bills of credit; and it did issue paper money in large quantities to pay the expenses of the war.

POWERS OF THE CONGRESS UNDER THE ARTICLES.

But it had no power to tax, no power to regulate trade, and no effective authority to settle disputes among the various states themselves. Compared with the vast range of authority which the Constitution of the United States conferred on the new federal government ten years later, these powers seem pitiably small; yet they represented substantial concessions on the part of the states. Public opinion was not at the time prepared to go farther. The people were afraid of "strong" governments. They were afraid of a supergovernment. They were afraid of too much government.

The Articles of Confederation did not bestow much attention upon the executive branch of the government. It was assumed that the congress, while in session, would itself perform all necessary executive functions; but provision was made for a committee of the states to sit and act

[1] For the text of the Articles see William MacDonald, *Select Documents Illustrative of the History of the United States, 1776–1861* (New York, 1899).

when the congress was not in session. Likewise, it was stipulated that the congress should appoint such "civil officers" as might be needed; and it did appoint a superintendent of finance, a postmaster general, a secretary of war, and a foreign secretary. These appointments foreshadowed the "heads of departments" who later became an integral part of the federal executive under the Constitution of 1787.[1]

THE EXECUTIVE.

Some of the states were so slow in ratifying the Articles that the war was virtually over before the confederation completed its legal formalities. Then, with the disappearance of a common danger, the states gradually lost interest in the idea of a union and let things drift until they got into a bad way. The confederation, based upon the Articles, continued in existence, and its congress tried to hold meetings; but the attendance of members diminished steadily as the states lost interest.

THE LACK OF COERCIVE POWER.

The war had inflated the currency, and prices had gone sky-high. Everybody cried out that the cost of living was excessive, but there was no one with power to reduce it. To visualize what inflation means, and what widespread suffering follows in its train, one need only consult the experience of the United States during this era, 1781–1787. The farmers blamed the merchants, the merchants blamed the politicians, the politicians blamed the propertied classes.

THE CRITICAL ERA: INFLATION 1781–1787.

But turn for a moment from the demoralized affairs of the confederation and see what the states themselves had been doing during the war and after. As the hostilities spread from one colony to another in the early months of the war, the various royal governors and officials fled the country, leaving the assemblies to do as they pleased. Connecticut and Rhode Island merely made a few changes in their colonial charters and retained them after independence. Virginia, on the other hand, called a convention which, under Jefferson's leadership, adopted a constitution with a bill of rights and provision for a new frame of state government. One after another the remaining states followed, until Massachusetts, the last of the thirteen, adopted her first state constitution in 1780.

WHAT THE STATES WERE DOING MEANWHILE.

While these new state constitutions differed considerably in their detailed arrangements, they presented a fundamental similarity.[2] In every case provision was made for a governor, to be chosen either by

[1] See J. B. Sanders, *Evolution of Executive Departments of the Continental Congress, 1774–1789* (Chapel Hill, N. C., 1935).

[2] A conspectus, showing the main features of these several state constitutions, may be found in Edward Channing, *History of the United States*, Vol. III (1916), pp. 459–462.

the legislature or by the voters; in nearly every instance a legislature of two chambers was set up; and each state provided itself with a judiciary. Large powers were everywhere allotted to the state legislatures. The principle of "separation of powers" — that is, of keeping the executive, legislative, and judicial organs of government separate — gained recognition in only a few of these state constitutions; but in two of them it was stated plainly; namely, in the Virginia constitution of 1776 and in the Massachusetts constitution of 1780.

THE FIRST STATE CONSTITUTIONS — THEIR CHIEF PROVISIONS.

Another characteristic of the earliest state constitutions was the emphasis which most of them placed upon "bills of rights" containing securities for individual liberty. Freedom of speech and of assembly, the right of trial by jury, the privilege of the writ of habeas corpus — these and many other so-termed unalienable rights were now solemnly set forth in black and white. The state constitutions of this war period, indeed, were strongly tinged with that "natural rights" philosophy which marked the Declaration of Independence. They emphasized the doctrine that men were equally free and independent, that all political power came from the people, and that governments rested upon the consent of the governed.

BILLS OF RIGHTS.

The framing of these state constitutions had an important educative influence. The thoughts of the people were directed to the fundamentals of government. Men read the writings of Locke, Montesquieu, and Tom Paine; they talked of social compacts, checks and balances, popular sovereignty, and the natural rights of the citizen.[1] Hundreds of leading citizens, throughout the thirteen new states, gained practical experience in the framing of constitutions. All this proved to be of great service when the time came to frame a national constitution. The country had passed through a course of education in the theory and practice of constitutional government. By 1787 the whole people had become familiar with written constitutions emanating from the people and guaranteeing them against the abuse of power.

THE REVIVED INTEREST IN THE STUDY OF POLITICAL FUNDAMENTALS.

But, while men were discussing the doctrines of Locke and Paine, the economic situation in America was getting steadily worse. While they argued about political ideals, the economic depression became more severe and popular discontent rose steadily higher. One cause of the trouble was the scarcity of real money, despite the flood of paper notes issued by the confederation and

INTERSTATE JEALOUSIES DEVELOP.

[1] See the discussion in A. N. Holcombe, *State Government in the United States* (3rd edition, New York, 1931), pp. 23–75.

by the states. Everybody wanted to pay his debts in this depreciated "rag money," but creditors were unwilling to take it except at a heavy discount. It was impossible to carry on trade under such conditions; yet thousands of foolish people clamored for more governmental spending, more borrowing, more paper currency as a way of regaining prosperity. Today all this has a familiar sound.

THE WAR OF BANTAM TARIFFS.

Even more menacing to the general security was the bad feeling which rapidly developed among the states themselves. Each was hurrying to build up trade at the expense of its neighbors. Those states which had natural advantages tried to exclude others from the use of them. A war of hostile tariffs began in 1785, when New York imposed fees upon all vessels entering its ports from Connecticut or New Jersey. The duties which New York laid upon imports were paid in large part by the inhabitants of those neighboring states in their capacity as consumers. Madison likened North Carolina, which paid tribute of that kind to Virginia and South Carolina, to a patient bleeding at both arms. Virginia and Maryland were at swords' points over the navigation of the Potomac. Great Britain, of course, did not fail to profit by these dissensions. The London government laid toll upon American trade with the British West Indies and delayed handing over the trading posts in the American Northwest, although the treaty of 1783 had promised that these posts would be given up.

WHY THE CONGRESS COULD NOT INTERVENE:

1. IT HAD NO MONEY.

2. IT HAD NO CREDIT.

Why did not the congress of the confederation intervene to prevent this drift toward economic anarchy and civil strife? It was still meeting each year at Philadelphia, and certainly it would have intervened if it had possessed the authority. But the congress had no power of taxation and hence no revenues. It had no money to pay interest on loans or even the ordinary expenses of government. It had authority to borrow money; but with no regular revenues to ensure prompt payment of interest, it was not possible to obtain loans on any reasonable terms. The national credit of the United States in these critical years was lower than that of Peru or Mexico today. John Adams in 1785 was sent to Europe on a borrowing trip, but all he could raise was a relatively small sum at an exorbitant rate of interest. European bankers, in those days, regarded American government bonds as a speculation, not an investment.

Equally vital among the weaknesses of the confederation was its lack of power to regulate trade, either with foreign nations or among the several states, or with the Indian tribes of the great hinterland. There was urgent need for some uniform trade control, but the congress of the

confederation had no power to establish anything of the sort. Each state, on the other hand, was making its own tariff, designed to shut out goods from other states. Self-sufficiency and autarchy are terms of present-day use, but the idea involved in them is not new by any means. It is just what the thirteen American states were attempting to achieve in the years 1783–1787. Given a fair chance, such a policy would have led to a civil war long before one actually came.

3. IT HAD NO POWER TO REGULATE COMMERCE.

Worst of all was the outlook in international relations. England was still entrenched in Canada to the north, while Spain possessed the Southwest. The American colonies had won their independence with the aid of France, but who could tell how long the tottering French monarchy would stay friendly or continue in a position to render aid? Two powerful nations of Europe were on the confederation's flanks: what if they should some day join hands to raid the land and divide the spoils? Such a danger was by no means beyond the range of possibilities if the states should start warring among themselves. Seventy-five years later, when a much larger group of American states engaged in civil strife over the issue of slavery, the danger of foreign intervention, and with it the possible disruption of the Union for all time, was still serious. How much more vividly the danger must have appeared to thoughtful men in the closing decades of the eighteenth century!

4. IT WAS WITHOUT POWER TO ENSURE THE COMMON DEFENSE.

Finally, there was the question of the great western territories. At the close of the Revolution all the land east of the Mississippi was claimed by one or another of the various individual states. These claims, most of them based on colonial charters or on treaties with the Indians, were hopelessly in conflict. If each state had undertaken to enforce what it considered its own rights, there would have been a general war. So it was proposed that all should hand over their claims to the congress, which would then use the territory for the common benefit, eventually making new states out of it. One by one the several states consented to do this, and in 1787, shortly before the congress of the confederation went out of existence, it passed the famous Northwest Ordinance providing a frame of government for this ceded territory.[1] Although this was probably the most important piece of legislation enacted by the congress, only eighteen members, representing eight of the thirteen states, were present

THE PROBLEM OF THE WESTERN TERRITORIES.

THE NORTHWEST ORDINANCE.

[1] J. A. Barrett, *Evolution of the Ordinance of 1787* (New York, 1891); B. A. Hinsdale, *The Old Northwest* (new edition, New York, 1899); and Thomas P. Abernethy, *Western Lands and the American Revolution* (New York, 1937), give in detail the history of this enactment.

to vote on it. How could a central government hope to manage this great western domain firmly and successfully if it could stir up no more public interest than that?

DARK AND BRIGHT SPOTS.

Along with the economic depression there was, as always happens, a weakening in popular respect for government and for the existing social order. People were defaulting on their taxes, refusing to pay their debts, insisting that the government owed them a living, and in some cases calling for a redistribution of private property. The Shays Rebellion in Massachusetts (1786) proved that something akin to chaos in government had spread a long way.[1] On the other hand, one must not paint too doleful a picture of those times.[2] There were some bright spots on the horizon. Bad as conditions were, they hardly justified Alexander Hamilton's lament that the country had reached "almost the last stage of national humiliation." "National disorder, poverty, and insignificance," he lamented, "form a part of the dark catalogue of our public misfortunes." [3]

SUMMARY.

Washington readily put one finger on the prime source of the trouble and pointed another towards the obvious remedy. "I do not conceive," he wrote, "that we can exist long as a nation without having lodged somewhere a power which will pervade the whole Union in as energetic a manner as the authority of the state governments extends over the several states." In other words, the congress of the confederation was a government of the states, not a government of the people. It was weak because it lacked four things which every strong national government must possess: the power to tax, to borrow, to regulate commerce, and to maintain an army for the common defense. Now it is significant that these were the four great powers given to the Congress of the United States by the new Constitution, which in 1787 replaced the old Articles of Confederation.

THE ANNAPOLIS CONVENTION (1786).

But how could steps be taken to establish a strong central government such as Washington had in mind? Fortunately, it happened that Maryland and Virginia were at this moment endeavoring to reach an agreement on certain matters affecting trade, tariffs, and navigation. Then Pennsylvania and

[1] What did the radicals want? "Their creed is that the property of the United States has been protected from the confiscations of Britain by the exertions of all and therefore ought to be the common property of all. . . . They are determined to annihilate all debts, public and private, and have agrarian laws which are easily effected by means of unfunded paper money which shall be a tender in all cases whatever." — *From a letter of General Knox to George Washington (1786).*

[2] For an interesting summary of the bright spots, see Charles A. and Mary R. Beard, *The Rise of American Civilization* (2 vols., New York, 1927), Vol. I, pp. 302–309.

[3] *The Federalist*, No. 15.

Delaware were asked to join in the negotiations. Seeing the opportunity, James Madison persuaded the legislature of Virginia to invite all the states to a conference at Annapolis, so that the whole question of interstate trade relations might be discussed. The response was quite disappointing; for when the conference convened, only five states were represented and it was not deemed worth while to proceed.[1] Before the conference adjourned, however, Alexander Hamilton of New York made the suggestion that another attempt be made to get all the states into a convention, so that the question of confederation might be considered. Resolutions were accordingly adopted, asking all the states to send representatives to such a convention in Philadelphia during the summer of 1787. The congress of the confederation was asked to join in this call, which it did after a delay of several months.

Meanwhile Washington, Hamilton, Madison, Franklin, and others had lent their great personal influence in support of the plan. Nothing was said about framing a new federal constitution. No one dared to propose that the convention be authorized to go so far. The avowed purpose was to revise, supplement, and strengthen the Articles of Confederation. When the call reached the various state legislatures, some of them acted promptly; others were suspicious and held off; but in the end all of them except Rhode Island appointed delegates.

ITS OSTENSIBLE PURPOSE.

The invitation did not specify how the delegates were to be chosen, but in all cases the appointments were made by the state legislature, or by the governor under authority given by the legislature. In no case were the delegates to the constitutional convention of 1787 directly elected by the people. Many of them were sent with specific instructions to revise the Articles and do nothing else. The date fixed for the assembling of the delegates at Philadelphia was the second Monday in May, 1787.

HOW DELEGATES WERE CHOSEN.

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[1] Nine states appointed delegates, but only Virginia, New York, New Jersey, Pennsylvania, and Delaware were actually represented.

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CHAPTER III

THE CONSTITUTION AND ITS MAKERS

While some have boasted the Constitution as a work from Heaven, others have given it a less righteous origin. — *Robert Morris.*

When one sets out to tell the story of the United States Constitution, it is hard to know where to begin. If you start with the convention of 1787, you will find that the members of that immortal gathering, in almost everything they did, harked back to the constitutions which had just been put into operation by the several states. If you go back to these state constitutions, you will discover that they cannot be fully understood without referring to the colonial charters. But these colonial charters had their origin and inspiration on the other side of the Atlantic. Their roots reach deeply into English history. So, the framing of the American Constitution did not really begin at Philadelphia in 1787, but at Senlac, Runnymede, Marston Moor, and Westminster many generations earlier. John Lackland, Simon de Montfort, John Hampden, and Oliver Cromwell, not to speak of John Milton and John Locke — they all had a hand in it. In a sense, indeed, Aristotle was one of the framers, for he first enunciated the principle of separation of powers, which is a very important feature of the American Constitution.

WHEN AND WHERE DID THE MAKING OF THE CONSTITUTION BEGIN?

But a chapter on the making of the Constitution cannot well go back to Aristotle. It will be long enough if it explains how the document was framed, where some of its fundamental ideas came from, who did the work, and what difficulties they had to overcome. These things are worth knowing, for in spite of its flaws the work turned out to be a great achievement, perhaps the greatest single stroke of statesmanship in the whole history of the American people. These Fathers of the Republic, when they finished their task more than one hundred and sixty years ago, were not very proud of their handiwork, but they builded better than they knew.

The convention was summoned to meet on the second Monday in May, 1787; but, when that date arrived, many of the delegates had not

reached Philadelphia, and more than a fortnight was lost in getting started. At length, a sufficient number being on hand, the convention unanimously chose Washington as its president, decided that votes should be taken by states (not by individual delegates), ordered that the deliberations be kept secret, and plunged right into its work.[1] The meetings were held in the old brick State House in Philadelphia, the building in which the Declaration of Independence had been signed, and probably in the same room.[2]

ORGANIZATION OF THE CONVENTION.

Who were the men here assembled to wrestle with the problem of welding thirteen jealous commonwealths into a "more perfect union"? First and last, 74 delegates were appointed; but only 55 ever attended, and some of these were present for a few days only. The average daily attendance was between 30 and 35; but they formed a remarkable group. Jefferson once spoke of them as an "assembly of demigods." Others have seconded his praise by designating them as the greatest galaxy of patriots ever assembled in one place. As a matter of fact, however, the group was not a gathering of supermen, but contained men of all types, with both big and little minds. Of course, as everyone knows, it included a few great figures. Washington, Franklin, Madison, and Hamilton would have done honor to any assembly, no matter how exalted its standards of statesmanship.

WHO COMPOSED IT?

But the convention also included in its membership some men of very moderate ability, and a few who possessed neither ability nor a sense of humor, as the proceedings disclose. All that can truly be said of the convention's make-up is that there were men of widely differing capacities, foresight, temperament, experience, and ingenuity. Therein lay its strength and power. In addition to the great quartet just mentioned, the membership of the convention included a number of capable, shrewd, and resourceful men such as Gouverneur Morris, James Wilson, John Dickinson, and Oliver Ellsworth; several substantial men of affairs such as Robert Morris, Nathaniel Gorham, and Thomas Fitzsimons; a few adroit politicians such as Elbridge Gerry and Roger Sherman; some sensible delegates of more than moderate ability such as Rufus King, William Paterson, Edmund Randolph, Robert Few, John Rutledge, and the two Pinckneys; one or two long-winded obstructionists of parochial outlook, like Luther

ALL SORTS OF MEN.

[1] The convention appointed a secretary, William Jackson, who kept a journal of the proceedings, but it turned out to be little more than a skeleton of formal motions and votes. If we had to depend on this journal alone, we would know very little of what went on in the convention from day to day. But James Madison, one of the leading delegates, wrote a personal diary of the proceedings, which subsequently proved to be of the highest interest and value. Many editions of the *Debates* have been published.

[2] Some of the meetings may have been held in the room upstairs.

Martin; and a number of others who had little to say, but who listened attentively and voted right when important issues arose.[1]

THE ABSENT NOTABLES.

Those who are familiar with the post-Revolutionary epoch of American history will notice that although the foregoing list is an imposing one, it omits the names of several well-known leaders. Thomas Jefferson was not a delegate; he was in France on a diplomatic mission. But Madison kept him informed of what was going on, and in general he approved. Patrick Henry was not a member of the convention; he had an opportunity to be one of the Virginia delegation but was suspicious of the whole enterprise and declined. John Hancock was not there, nor Samuel Adams of Massachusetts, nor Tom Paine, the great radical, nor John Marshall, the foremost expounder of the Constitution in later days. These absences were notable.

VARIETY OF OPINIONS AND INTERESTS REPRESENTED.

The 55 delegates came from twelve states. Rhode Island was alone in being unrepresented: her legislature was controlled by radicals who would have nothing to do with the proceedings. Pennsylvania sent 8 delegates; Virginia, 7; while New York sent only 3, and these were absent a large part of the time. No fixed quota was set because, irrespective of the size of its delegation, each state was to have one vote. Nearly half the delegates were college graduates; and a majority had held public offices of one sort or another, some of them posts of high importance.[2] Twenty-eight had sat in the continental congress or in the congress of the confederation. Almost as many were destined to serve in office under the new Constitution. Lawyers were in the majority.[3] Not a few delegates were men of large wealth or important business interests. Washington was the richest Virginian of his day and one of the wealthiest men in the whole country. Pierce Butler of South Carolina ranked among the rich citizens of his own commonwealth. Robert Morris of Pennsylvania was a large landowner; his holdings at one time ran into millions of acres. Many other delegates, though not rich, were men of considerable property according to the standards of the day. All but a very few were drawn

[1] William Pierce of the Georgia delegation diverted some of his time from the serious work of the convention to write and leave for posterity an interesting, though somewhat facetious, sketch of his colleagues. It is printed in the *American Historical Review*, Vol. III (1897–1898), pp. 310–334.

[2] Nine were graduates of Princeton, four of William and Mary, two of Yale, two of Harvard, two of Pennsylvania, and one of Columbia. Among European universities Oxford, Glasgow, and Edinburgh were represented.

[3] Thirty-three out of the fifty-five delegates who attended the convention were lawyers. Eight were business men and six were plantation owners. One was a clergyman, one a teacher, one a physician. Three could hardly be called anything but politicians, and the remaining two had no occupation.

from the professional and business classes. Roger Sherman of Connecticut, a shoemaker by trade, and William Few of Georgia, the son of a small farmer, were about the only delegates who could be said to represent the common man. It is significant, but not surprising, that there was not a single frontiersman or wage earner among the fifty-five delegates. The convention was an assemblage of "gentlemen," as the term went in those days — that is, men of good birth and breeding, who had a sense of the social amenities.

ARISTOCRATS AND DEMOCRATS.

Nevertheless, every shade of opinion and political belief was represented among them, from Alexander Hamilton, who would have created a highly centralized union, to Luther Martin of Maryland, who wanted the old confederation left as it was, weaknesses and all. There were those who wanted a genuine democracy, and others who were afraid of it. Washington feared that this diversity of opinion was so great as to preclude any action whatever. Yet these differences in attitude, outlook, and temperament proved in the end to be an advantage. They prevented hasty, one-sided decisions. They compelled compromises, and it was these compromises that ultimately saved the day. A constitution dictated by any one group in disregard of the others would never have received approval by the states.

RICH MEN AND POOR MEN.

The fact is that there were quite a few rich men among the framers of the Constitution, and that fact has given much concern to present-day champions of the forgotten man. One distinguished student of American government, some years ago, wrote a whole volume to demonstrate that the Constitution was drafted and put through by men who owned land, mortgages, depreciated paper money, or government bonds; in other words, by men who stood to profit financially by the establishment of a strong, orderly government.[1] The implication is that they must have been moved by a desire to protect vested wealth and to secure special privileges for people of their own class.

WEALTH AND THE DECLARATION OF 1776.

But wait a moment. Many of those who signed the Declaration of Independence were also men of wealth. John Hancock, whose flaming signature tops the list, was probably the richest man in Massachusetts. Jefferson was a large owner of land. John Adams, Robert Treat Paine, and Elbridge Gerry were men of property. The same is true of several others, perhaps of the majority among the signers. So, the Declaration, quite as clearly as the Constitution, was the work of moneyed men; but does this mean that

[1] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (new edition, New York, 1935). A different appraisal of the facts appears in Charles Warren, *The Making of the Constitution* (Boston, 1937).

its forthright phrases were conceived in a spirit of class selfishness? The ownership of property was not looked upon as a barrier to public confidence in those days. The leaders in colonial times had been men of substance; the leaders of the Revolution came mainly from the well to do. Should it be made a reproach to Washington that he was rich as well as resourceful? Or to Franklin that he was thrifty as well as wise? Was Jefferson any less of a democrat because he owned broad Virginian acres? The people of his own time did not think so.

THE LEADERS: GEORGE WASHINGTON.

Washington presided throughout the convention's deliberations. His great prestige lent dignity to the proceedings, but as presiding officer he felt debarred from any part in the debates and is only twice on record as formally addressing the convention — on the first day to welcome the delegates and on the last day to bid them farewell. But he rendered great service in calming the occasional storms of personal animosity, and there is reason to believe that he exerted a good deal of influence on some of the delegates off the floor.

BENJAMIN FRANKLIN.

Benjamin Franklin, who headed the Pennsylvania group, was the most versatile genius of them all (the "first civilized American," one of his biographers calls him), but he was now eighty-one years old, crippled with rheumatism, and his voice would no longer rise above a whisper. Nevertheless, his mature judgment and his quiet optimism were steadying factors of great value. His pen did service when his voice failed, and some of the wisest suggestions came from it.

ALEXANDER HAMILTON.

In point of political genius, imagination, and eloquence, none of the delegates equaled Alexander Hamilton of New York. He was still a young man, only thirty, well educated, and with intense political convictions. Unfortunately he had to be absent a good deal and was not able to take any part in some of the most exciting debates. Hamilton distrusted popular government and insisted that the new ship of state be well ballasted. He wanted the preponderance of power to be vested in the central government; he proposed that senators hold office for life and that the governors of states be appointed by the federal authorities. Moreover, he would have made all state laws subject to absolute veto by these governors.[1] Of course his fellow delegates were not prepared to support such a highly centralized plan. Hamilton was rated the most eloquent speaker in the convention, and his colleagues listened appreciatively to all that he said; then they

[1] See Hamilton's "Draft of a Constitution for the United States," printed in Max Farrand, *Records of the Federal Convention of 1787* (3 vols., New Haven, 1911), Vol. III, Appendix F.

proceeded to vote his motions down. On one occasion, after his most magnificent effort, he received nobody's vote but his own. As one of his fellow delegates said, "he was praised by everybody and supported by none."

JAMES MADISON.

Then there was James Madison of Virginia. He is often called the "Father of the Constitution," and if the attribute of paternity must go to someone, he is entitled to it. Less brilliant than Hamilton, he was more widely read, more tolerant, and more patient in the advocacy of his views. A prim little man, still in his middle thirties, but looking prematurely old, he was entirely without what we now call personal magnetism. His style of writing was arid and his voice monotonous. But if ever a man proved that the right kind of scholar has his place in politics, Madison did it in this convention. The breadth and accuracy of his information, the modesty of his demeanor, and the quiet compulsion of his arguments — these things contributed to make him a more influential figure at Philadelphia than Edmund Burke or Daniel Webster could have been.

SOURCES OF HIS GREAT INFLUENCE.

A graduate of Princeton and from early days an industrious student of past politics, Madison knew what had brought about the rise and fall of every federation from the Achaean League to his own day. In preparation for the convention he drew up elaborate "Notes on Ancient and Modern Confederacies," and this manuscript furnished him with ammunition for his part in the debates. Moreover, much of what we now know about the proceedings of the convention is due to Madison's methodical industry, for day by day he entered in his private journal a summary of what went on, and, as a veracious record, this has proved to be invaluable.[1] The Constitution as finally drafted was by no means a mirror of Madison's political ideas, but it included many of the things that he had championed in the debates. James Madison deserved well of his country, and his days were long in the land, for he outlived all the other members of the convention.[2]

[1] Here is Madison's account of the way in which the *Journal* was compiled: "I chose a seat in front of the chamber . . . In this favorable position for hearing all that passed, I noted in terms legible or in abbreviations and marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and the reassembling of the convention I was enabled to write out my daily notes . . . It happened also that I was not absent a single day, nor more than a casual fraction of an hour in any day, so that I could not have lost a single speech unless a very short one." The original *Journal* is now in the Library of Congress. It was not published until after Madison's death.

[2] He died in 1836, almost a half century after the Constitution left the hands of its framers. Madison, by the way, was an ardent admirer of his fellow Virginian, Thomas Jefferson, by whom his political views were considerably influenced. President Theodore Roosevelt once referred to Madison as "a pale copy of Jefferson." That was hardly a fair characterization.

James Wilson of Pennsylvania also deserves a place in the hall of fame, for he ranks next to Madison as the best-informed and most industrious member of the convention. Wilson was a good lawyer, reasoned clearly, and took great delight in smashing down, with sledge-hammer blows, the arguments of his opponents. With Madison he worked shoulder to shoulder, and they made a great team. Togèther they won many victories, and it was sometimes difficult to determine which deserved the major portion of the credit.

JAMES WILSON.

There were others whose activities in the convention almost gave them rank as leaders. Luther Martin of Maryland was one of these, a powerful advocate but a partisan one, who made speeches of pitiless length. On one occasion he spoke for two whole days — hot days at that. The world must have lost a great oration, for not a fragment of it has been preserved. There has merely come down to us the comment of a fellow delegate, Oliver Ellsworth, who wrote that Martin had "exhibited without blush a specimen of eternal volubility." John Dickinson of Delaware, and Gouverneur Morris of Pennsylvania, Roger Sherman and Oliver Ellsworth of Connecticut, Rufus King and Elbridge Gerry of Massachusetts, William Paterson of New Jersey, George Mason and Edmund Randolph of Virginia, the two Pinckneys of South Carolina, were all active in the proceedings and contributed to the outcome in varying degrees. It is hard to tell just how much influence each exercised, for in the constitutional convention of 1787, as in all deliberative bodies, the men most frequently on their feet were not necessarily the ones whose words carried the greatest weight.

OTHER LEADERS.

While the convention was made up of men of all ages, from twenty-seven to eighty-one (the average being about forty-two), it is significant that some of the best work was done by the younger members. James Madison, who contributed most to the daily labors, was thirty-six; Alexander Hamilton was only thirty; and Gouverneur Morris, who put the finishing touches to the document, was just thirty-five. On the other hand, the elder statesmen contributed quite as much, or more; among these were Washington who was fifty-five, Roger Sherman at sixty-six, and Benjamin Franklin, the Nestor of them all, at eighty-one. The Constitution, accordingly, reflected the zeal and optimism of relatively young men, chastened by the mature judgment of their older colleagues.

A BODY OF YOUNG MEN.

But, most important of all, the convention was strong in political realists, men of practical experience in politics. A majority of the delegates had served in the continental congress, or in the congress of the

confederation, or had helped to frame the constitutions of their respective states, or had been governors, or members of state legislatures. Very few of them were without political experience of some sort, and many of them had acquired a great deal of it. This was what kept the convention from chasing rainbows. Its members combined political idealism with the practicality which comes from contact with the realities of public life. During the debates, there were references to the political theories of Grotius, Locke, and Montesquieu, it is true, but there were more frequent allusions to the actual experience of Maryland, Massachusetts, and Virginia.

BUT THE DELEGATES WERE MEN OF EXPERIENCE.

In organizing, the convention adopted its own rules. The delegates, as has been said, were pledged to secrecy; and this was a wise move, for if the subsequent bitter disagreements among the members had been known to the people, the Constitution would probably never have been ratified by the states. The summer of 1787 was an unusually hot one in Philadelphia, but sessions were held almost every weekday from May to September. Plans and proposals were brought in and referred to committees, but all important issues were threshed out on the floor by the whole convention. Those who glance through Madison's *Journal* will observe that some things were discussed for a while, then laid over, then taken up again, voted upon, reopened, reconsidered, and argued a half-dozen times before a final agreement was reached. The rules of procedure permitted the utmost freedom of debate and reconsideration. Nothing was hurried through.

THE PROCEDURE.

PLANS, COMPROMISES, AND AGREEMENTS

It did not take long to discover that there were conflicting opinions as to what the convention ought to do. Some delegates felt that the Articles of Confederation should be used as a basis, and that the convention had no authority to do more than strengthen these Articles. In a sense they were right. It was for this express purpose that the delegates had been appointed. But others were of the opinion that the Articles were so hopelessly inadequate that revising them would be a waste of time. A vote on this question was taken, and the convention decided to begin afresh.

FUNDAMENTAL QUESTIONS: THE NATURE OF THE UNION.

Madison argued strongly for this procedure. Even before the sessions began, he and his Virginia colleagues had prepared a scheme which disregarded the Articles altogether, and this plan was now submitted to the convention by Edmund Randolph. Known as the Virginia plan (although largely Madison's work), it proposed a real federal union, with a central executive, legislature, and

THE VIRGINIA PLAN.

judiciary. Further, it contemplated that the federal government should have independent taxing powers and should possess authority to make its mandates go directly to the individual citizen, not merely to the states. The federal Congress, under this plan, was to be made up of representatives from the several states in proportion to the number of "free inhabitants" in each, or in proportion to their respective tax contributions. Thus the larger states would control the new federal legislature. The Congress, moreover, was to be given a veto on all laws passed by the legislatures of the several states.

The opponents of the Virginia plan were slow in organizing, but presently William Paterson of New Jersey, on behalf of the small states, brought forward an alternative scheme.[1] This New Jersey plan contemplated the continuance of a congress on substantially the same lines as under the Articles of Confederation — a single chamber with each state having one vote, but with the addition of an executive chosen by the Congress, and with provision for a federal judiciary. It provided for a federal revenue by giving Congress the power to levy taxes on the several states and to use force, if necessary, to compel the fulfillment of such obligations.

THE NEW JERSEY PLAN.

For weeks the convention, in committee of the whole, debated the merits and shortcomings of these two general plans. Representatives of the larger states pointed out the unfairness of giving to the states which paid most of the taxes no more representation than to those which contributed little. Delegates from the smaller states retorted that states, like men, were created free and equal. There was no more reason, said one delegate, for favoring a large state in the matter of votes than for "giving a big man more votes than a little man."

COULD THESE TWO PLANS BE RECONCILED?

The fundamental trouble was that some states were large and some small; while all were equally sovereign and independent. They had adopted the doctrine of equality as a makeshift at the outset of the war. They had been equally represented in the continental congress and in the congress of the confederation. Now the small states held to equality as a vested right. For a time it seemed as though the convention would break up in disorder by reason of its failure to resolve this fundamental disagreement. "The fate of America," as Gouverneur Morris put it, "was suspended by the strength of a hair." But happily there were enough prac-

[1] An alternative plan was also laid before the convention by Charles Pinckney of South Carolina. Just what this plan contemplated we do not know, for there is a good deal of doubt whether the document which has been published as the "Pinckney Plan" (*American Historical Review*, Vol. IX, pp. 741–747, July, 1904) is authentic.

tical politicians on hand to find a solution through the channel of compromise.

THE CONNECTICUT COMPROMISE.

This solution is commonly known as the Connecticut compromise, because it was brought forth in its final form by delegates from that state, although it is believed to have sprung from the fertile intellect of Benjamin Franklin. In brief, it provided that the upper house of the proposed federal Congress should be based on the *equal representation of the states*, while the lower house should represent the several states *in proportion to their respective populations*, with the additional proviso that all bills for raising revenue should originate in the lower house. Before the delegates from the larger states would agree to this arrangement, however, they made certain that the new government would be a real one. The compromise was not accepted by them until after the convention had decided that the new Congress, unlike its predecessor, should exert its powers directly upon the individual citizen through its own laws; likewise, that the new government would have its own executive officials and courts.

OTHER COMPROMISES.

Presently other sources of friction appeared. Representatives in the lower house of the new Congress were to be apportioned among the several states on a basis of population, but in counting the population of a state were slaves to be included or left out? And should Congress be free to prohibit the importation of slaves, thus depriving the southern states of their labor supply? Having power to regulate commerce, should Congress be permitted to lay a tax on exports? These and various other questions were productive of much wrangling, but in due course all of them were adjusted.

Many other problems had to be worked over patiently. The convention, to use Benjamin Franklin's metaphor, spent a great deal of its time sawing boards to make them fit. The Constitution is full of sawed-off provisions. Take the congressional term, for example. Some wanted congressmen elected annually; others urged a three-year term. In the end they split the difference and made it two years. So with the qualifications for voting. A few desired to establish manhood suffrage for all white citizens. Others favored a strict property qualification. In the end they left each state to decide this matter for itself. Another compromise is not embodied in any single clause of the Constitution, but permeates every section of it. This compromise resulted from the balancing of ideas between those who desired a strong central government and those who were afraid of strong governments. The convention tried to satisfy one group by giving the new federal government some general, far-reaching powers, while endeavoring to reassure the other group by providing

plenty of checks and balances. Thus the Constitution, when it emerged, was an attempted equipoise of two conflicting political philosophies.

But it would be wholly incorrect to say that this great document was the work of trimmers and timeservers. As a matter of fact it embodied more unanimous agreements than compromises. Take the most important single section of the Constitution, for example, the one that sets forth the "eighteen powers of Congress." [1] On at least fifteen of these powers there was no serious disagreement at all. Everyone agreed, for example, that the new government should have power to levy taxes, to borrow money, to regulate foreign commerce, to declare war, to coin money, to control the postal service, to provide for the national defense, and so on. The same thing is true of the limitations which the Constitution placed upon Congress, and on the states. When you say that the Constitution is a "bundle of compromises," you are partly right; but with equal correctness the document can be designated as a series of virtually unanimous agreements.

THE AGREEMENTS OF THE CONVENTION.

The convention did much of its work in committee of the whole — debating, enlarging, amending, and finally adopting twenty-three resolutions most of which were along the lines of the Virginia plan. These resolutions were then referred to a committee of detail which elaborated the resolutions into articles and sections. Thereupon the convention went over the whole thing, section by section. Nearly five weeks were spent at this task, the members working five or six hours each day. Every phrase, indeed almost every word, was scrutinized as with a microscope. Early in September this long and tedious job was brought to an end, and a small committee was named to "revise the stile" of the document. Gouverneur Morris, as chairman of this committee, was charged with the work of putting the provisions into orderly form and clear phraseology. How well he performed this task no one who reads the crystal English of the document will fail to observe. For conciseness and lucidity the Constitution of the United States still stands without a peer among all constitutions.

PUTTING ON THE FINAL TOUCHES.

THE FIGHT FOR RATIFICATION

When the final draft was ready, it was signed by thirty-nine members of the convention. Of the others, some were absent, some refused to sign. The latter included Randolph, Gerry, and Mason, three of the most influential delegates. But there were no hard feelings. The delegates celebrated the end of their labors with a

SIGNING THE CONSTITUTION.

[1] Article I, Section 8.

gay dinner at the City Tavern, bade each other good-by, and started for their homes. The Constitution was then sent to the congress of the confederation with two recommendations: first, that the document be submitted for ratification to conventions specially elected for the purpose in each state; and, second, that the new government should be set up whenever nine states had ratified the Constitution. The first recommendation was due to a feeling that the Constitution would stand a better chance of adoption by special conventions than by the state legislatures. The second was intended to prevent the whole work from being nullified by the refusal of two or three states to come in. No one among the delegates had any expectation that all thirteen states would accept the new Constitution. Many of them doubted that even nine would do it.

These doubts were not surprising, for the members of the convention were themselves rather unenthusiastic over the product of their summer's labor. Not one of the thirty-nine who signed the Constitution regarded the document with full approval. Alexander Hamilton, for example, in giving his signature, took occasion to remind the convention that no man's ideas were more remote from the new Constitution than his own. He gave his approval because he felt convinced that the proposed new federal government could hardly be worse than the old confederation, and might perhaps be better. Benjamin Franklin also had misgivings; but, after remarking that the experience of fourscore years had taught him to doubt the infallibility of his own judgment, he placed his name at the head of the Pennsylvania delegation. "Thus, I consent, Sir, to this Constitution because I expect no better, and because I am not sure that it is not the best . . ." All along the line there were doubts and fears, tinged with a presentiment that the whole plan would probably come to naught through its rejection by the states.

THE NEXT GREAT QUESTION: WOULD THE STATES ACCEPT IT?

As the convention met behind closed doors, no inkling of what the delegates were doing had been allowed to reach the public until after everything had been decided. In lieu of any information from within the brick walls, however, the newspapers circulated all sorts of gossip. Many of the rumors were wild, but even the wildest among them found believers. It was asserted, and to some extent believed, that a monarchy was being hatched at Philadelphia and that a New-World George I would come from Mount Vernon to take the throne. When the Constitution was finally made public, a quietus was put upon such absurdities; but more rational opposition flared up. There were loud protests that the convention had been summoned to revise the Articles of Confederation

HOW THE NEW CONSTITUTION WAS RECEIVED BY PUBLIC OPINION.

and had no right to draft a new Constitution. Who gave these delegates at Philadelphia the right to say that their new Constitution should go into effect when approved "by conventions" called in nine out of the thirteen states?

THE FAULT-FINDERS.

Some critics thought that the new Constitution made the central government too strong; others that it did not make federalism strong enough.[1] Some protested that, by a failure to abolish all property qualifications for voting, it sought to perpetuate an aristocracy of wealth; others, that it went too far in the direction of democracy — with its short terms for congressmen and its provision for having the senators chosen by the state legislatures. Some complained that the new government would be too dependent on the states; others feared that it would be too independent of them. From all quarters, again, came the well-founded criticism that the Constitution contained no bill of rights, no guarantees for freedom of the press, freedom of speech, religious liberty, and so forth, such as had been incorporated in most of the state constitutions. Thomas Jefferson, for example, regarded this omission as the chief defect of the convention's work.

Then there were those who grumbled because the Constitution gave the new federal government power to issue paper money; while others objected because it took this right away from the states. Some were afraid that the President's power as commander in chief would make him an Oliver Cromwell who could come with a company of soldiers and turn Congress out of doors, and one critic made much of the fact that the power of Congress within the new federal capital, ten miles square, would be absolute and supreme, thus throttling free government at its very source. Clergymen took their fling at the document as sacrilegious because it contained no mention of the Deity and did not even require that office holders must be Christians. The fault-finders were numerous, and they included many influential leaders.

THE STRUGGLE FOR RATIFICATION IN THE VARIOUS STATES.

The congress of the confederation, after some delay and hesitation, sent copies of the Constitution to the legislatures of the several states. These, in turn, called on the people to elect delegates to state conventions. Such conventions in Delaware, Pennsylvania, and New Jersey accepted the new Constitution almost at once; Georgia and Connecticut followed within a few weeks. Then serious obstacles began to appear in some of the larger states: Massachusetts, New York, and Virginia — where

[1] In Paul Leicester Ford's *Pamphlets on the Constitution of the United States* (Brooklyn, 1888) will be found a collection of criticisms issued by various contemporary opponents of the Constitution. These are worth reading because they indicate how many flaws, real and imaginary, the opponents of the new Constitution were able to pick in it.

the campaign of opposition grew intense. Criticism was let loose in broadsides, pamphlets, cartoons, stump speeches, letters to the newspapers, and even in doggerel poetry. Letters of denunciation filled whole columns, even whole pages, of the weekly journals. *Constant Reader*, *Plain Truth*, *Americus*, *Sentinel*, *Taxpayer*, *Homespun*, and *Rusticus* laid their barrage across the editorial desks. Never before had America, or any other country, withstood such a blitzkrieg of the quill-pen brigade.

THE PERSONAL ANIMUS.

Nor was the ink-spattering wholly directed against flaws in the Constitution itself. Personal attacks were launched against the leading men of the convention, and even Washington did not escape the flood of invective. He might be a good soldier, they said, but he was a patrician in his ideas and a tyro in politics. Franklin was termed a doddering octogenarian in his second childhood, while Madison and Hamilton (still in their early thirties) were ridiculed as schoolboy politicians. Some of the pamphleteers and caricaturists tried to make people believe that John Dickinson and Robert Morris were Tories; that James Wilson was pro-British (Caledonian Jimmy, they called him) and Roger Sherman a weathercock, while the rest of the delegates were conceited nobodies. From Georgia to New Hampshire the states seethed with discussion, hot and heavy.

THE DANGER IN NEW YORK.

The danger was not merely that fewer than nine states would accept the Constitution, but that the refusal of one or two pivotal states might bog the whole plan. There was New York, for example, where popular feeling was running strongly against the Constitution. If New York stayed out, the new union could hardly be a success even though all the other states came in. For New York stretched right across the country from the Atlantic to the Lakes. Four states were to the north of her and eight to the south. Her harbor and strategic location made her doubly essential. No union could be solid without New York. The most immediate need, therefore, was for a campaign of counterpropaganda, or a campaign of education, which would focus the attention of the people, both in New York and elsewhere, upon the merits of the Constitution itself — not upon the failings of the men who had framed it.

THE CAMPAIGN OF EDUCATION.

Such a campaign was planned by Alexander Hamilton, who enlisted the cooperation of James Madison and John Jay. During the winter and spring of 1787–1788, these three wrote a series of letters which were printed, sometimes three or four letters a week, in various New York newspapers. Each letter dealt with some provision of the Constitution, explaining, defending, and appealing to the patriotism of the people. All bore the common signature *Publius;*

and, although the individual authorship of several letters cannot be definitely determined, it is beyond doubt that the great majority of them were the work of Hamilton and Madison.

VALUE OF THE *Publius* LETTERS.

Although these newspaper expositions of the new Constitution were written hurriedly and for campaign purposes, they set a high standard both in substance and in style. Brushing aside all personalities, all appeals to passion, or to sectional prejudice, they went right to the heart of every constitutional question. They were the work of men who knew, better than any others of their time, just what the provisions of the new Constitution were intended to mean. Naturally, the letters exerted a great influence upon the public mind, and particularly upon the minds of those who came to the state conventions without a clear understanding of what the various provisions of the Constitution implied. Had it not been for this vigorous educational campaign, there is every reason to believe that New York would have rejected the Constitution, for in the end that state ratified by the narrow majority of three votes. Even this narrow margin was not obtained until after assurance had been given that a bill of rights would be added to the Constitution by later amendment, thus removing one of the principal objections to the original document.

The Federalist.

Even before all the letters of Madison, Hamilton, and Jay had appeared in the newspapers, they were collected and printed in book form under the title of *The Federalist*. In that shape they have come down to us, and remain today the best contemporary exposition of what the Constitution meant to the men who made it. But of course the book is not a trustworthy guide for those who want to know what the various provisions of the American Constitution express or imply today. Twenty-one amendments have since been added; the courts have interpreted many clauses in a way which the makers of the Constitution could never have foreseen; political parties have arisen; and all sorts of usages have grown up around the original frame of national government. The student of American political philosophy will find in *The Federalist* nothing about radio censorship or collective bargaining, the interstate commerce commission or social security, dollar devaluation or debt limits, presidential primaries or the Atlantic charter — nothing about the many phases of public policy which are topics of discussion today. But as a treatise on the original philosophy of federal government in the United States these letters of 1787–1788 remain unsurpassed.[1]

[1] There are many editions of *The Federalist*, abridged and unabridged. The book can be found in any library.

While it is impossible to tell with certainty what would have happened had the Constitution been submitted for acceptance to the direct vote of the people in the various states, there is every reason to think that it would have been rejected. At the hands of conventions it had a far better chance of ratification, because in none of the states save New York were the delegates to these conventions chosen on a basis of manhood suffrage. In all the remaining states there were property or other qualifications for voting, and the propertied classes were, on the whole, favorably disposed towards the Constitution. They felt that nothing but a strong central government could stem the drift to anarchy. The Constitution drew its chief support from the business interests, the professional men (including the clergy), the plantation owners of the South, the merchants and shipowners, the men of education — in a word, from that part of the population which lived in the better-settled areas near the seacoast. A line drawn north and south, about fifty miles inland from the seaboard, would have marked off the supporters of the new Constitution from its opponents fairly well.

OTHER INFLUENCES RESPONSIBLE FOR THE ADOPTION OF THE CONSTITUTION BY THE STATES.

ATTITUDE OF THE PROPERTIED CLASSES.

The opposition came principally from the interior and sparsely settled areas, from the struggling farmers and pioneers who wanted cheap money issued by the states, who looked upon the merchants as profiteers, and who were in no mood to do anything that would benefit the towns.[1] The new Constitution was unpopular with the debtor class and exceedingly so among the non-property-owners who were still disfranchised in all but two states (New Hampshire and Pennsylvania). These nonvoters contributed a great deal to the storm of protests, but they did not count for much in the ratifying conventions.

WHERE THE OPPOSITION CAME FROM.

In any event, the Constitution was not carried into operation on any tidal wave of popular enthusiasm. One should remember that it was framed and submitted to the states at a time when business conditions were bad and the national outlook unpromising. The country was in a disillusioned, resentful frame of mind. The delegates at Philadelphia were men who kept in touch with their folks back home, and their ears were not closed to what these people were saying. They knew that the country was in trouble, that there was a widespread yearning for peace, order, and economic stability,

THE RELATION OF THE OUTCOME TO THE TIMES.

[1] For further information on this important point, see O. G. Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Constitution in 1787–88* (Madison, 1894), and C. A. Beard, *An Economic Interpretation of the Constitution of the United States* (new edition, New York, 1935).

rather than for a hypodermic shot of proletarian democracy. So they tried to devise a plan of federal government which would meet the existing emergency and could then be adapted to future needs as these might arise. Under such conditions, the Constitution was not so strongly infused with ultrademocratic provisions as would have been one framed ten years earlier, by the men who signed the Declaration of Independence, for example. It was not the sort of document that Daniel Shays, Patrick Henry, Tom Paine, or Sam Adams would have drawn.

A DEMOCRATIC ACHIEVEMENT, NEVERTHELESS.

But despite its numerous checks and balances, its conservative tone, its several compromises, and its emphasis on the right to life, liberty, *and property*, this Constitution set up an outstanding landmark in the growth of political democracy. No leading nation of Europe in 1787 had a written constitution of any sort; nor, with the single exception of England, did any one of them have even the forms of popular government. And the new American Constitution provided a scheme of government which was far more democratic in every real sense of the term than that which England possessed at the time. It is probable that Thomas Jefferson, had he been given the task, would have framed a more liberal document, and there is no doubt that Alexander Hamilton would have written a more conservative one. James Madison could readily have devised a more logical scheme of government. But no one of them would have had his handiwork accepted by the states. No one of them would have devised the compromises which the Constitution embodies, and without these concessions to the middle way there would have been no ratification.

THE FATHERS OF THE REPUBLIC.

The statesmen of 1787, at any rate, gained their main objective. They created a union that has endured. Their roll of parchment still governs their children's grandchildren, after the lapse of over a hundred and fifty years. Their thirteen states have grown to forty-eight; their three million people have increased nearly fiftyfold. Faulty though their work may have been in spots, can there be any greater tribute to its worthiness than that it has served so long? "Leaders of the people by their counsels, wise and eloquent in their instructions, all these were honored in their generations and were the glory of their times. . . . With their seed shall continually remain a good inheritance, and their children are within the covenant. . . . Their glory shall not be blotted out. . . . Their bodies are buried in peace, but their name liveth forevermore." [1]

But to return to the final ratification. It will be recalled that the

[1] *Ecclesiasticus* (Apocrypha), 44 : 4–13.

Constitution was to go into force whenever nine states should have accepted it. By midsummer of 1788 the necessary nine had been secured; Virginia and New York soon made it eleven, and the victory became decisive. North Carolina did not give assent till the autumn of 1789, however, and Rhode Island delayed ratification until the spring of 1790.

THE CONSTITUTION FINALLY RATIFIED.

When nine states had announced their adhesion, the congress of the confederation, which had prolonged its lingering existence during all these turmoils, issued a call to the various states to choose presidential electors, senators, and congressmen; likewise it designated New York as the temporary seat of the new government, and then gracefully bowed itself out of the picture. It could not muster a quorum to pass a motion of final adjournment. Ten states responded by choosing presidential electors, who in due course selected Washington as President and John Adams as Vice-President of the Union.[1] Likewise, they chose their quota of senators and representatives in the way prescribed. The new government took office on April 30, 1789.

THE NEW FEDERAL GOVERNMENT INSTALLED.

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[1] Because of a conflict between senate and assembly, New York failed to choose electors.

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CHAPTER IV

"THE SUPREME LAW OF THE LAND"

This Constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. — *The Constitution of the United States; Article VI, Paragraph 2.*

"When two men ride a horse," quoth Shakespeare, "one must ride behind." In a government there can never be two powers, each with ultimate supremacy. The Constitution of the United States, to use its own words, is "the supreme law of the land," and this clarion phrase makes perfectly clear where the Constitution stands. It is supreme over all organs of American government, national, state, and local. Its provisions, so far as they go, are binding on everyone from the chief executive of the nation down to the humblest citizen. Laws made in pursuance of this Constitution and treaties made under the authority of the United States are also paramount, because it is through them that the supreme constitutional power is exercised.

THE CONSTITUTION AS A DOCUMENT.

When people speak of the national Constitution, they usually think of a document framed at Philadelphia in 1787, a short document as such things go — shorter than the constitution of any other nation and much shorter than any of the American state constitutions. A model of conciseness it certainly is, for there are only 4,000 words in it, occupying ten or twelve pages of print, which can be read in half an hour. But let no one make the error of supposing that these ten or twelve pages can be understood merely by reading them, or that they contain all the constitutional rules which govern the American people today. In the document itself there are many things which are not visible to the naked eye. And pyramided upon its printed words is a superstructure of vastly greater dimensions, made up of federal and state laws, judicial decisions, usages, precedents, and official opinions, which fill statute books, law reports, rules of procedure, and administrative decisions to the extent of a million pages or more.

The architects of 1787 built only the basement. Their descendants

have kept adding walls and windows, wings and gables, pillars and porches, to make a rambling structure which is not yet finished. Or, to change the metaphor, it is a fabric which, to use the words of James Russell Lowell, is still being "woven on the roaring loom of time." That is what the framers of the original Constitution intended it to be. Never was it in their minds to work out a final scheme for the government of their country and stereotype it for all time. They sought merely to provide a starting point.

THE BUILDERS KEEP BUILDING.

In this sense John Marshall, Woodrow Wilson, and Franklin Roosevelt are entitled to be ranked as makers of the American Constitution just as truly as James Madison and Alexander Hamilton were. For these jurists and statesmen have from time to time infused the words of the Constitution with new meanings and a new spirit.[1] Thousands of others have helped them in this task, so that the makers of the Constitution, in all truth, form a great company whom no man can number. Even today they are at work, never more so; and their task will not be finished while the nation endures. The process by which the Constitution has been developed, year by year, will be explained in the next chapter of this book; meanwhile it may be well to indicate at the outset what its distinctive and fundamental features are.

In the first place, the Constitution gives recognition to the principle of popular sovereignty. It avows itself to be the act of the people. "We, the people of the United States, . . . do ordain and establish this Constitution." Of course it can be argued, and quite rightly, that the men who framed it were not chosen by the people, nor was their work ratified by a popular vote. But the fact remains that the document asserts itself to be an ordinance of the people and has been accepted as such for nearly five generations. In other words it establishes, and has maintained, a system of government based upon popular consent. Unlike totalitarian constitutions, it postulates the capacity of men for self-government. It rests on the proposition that to follow the freely given judgment of the whole people is safer, if not always wiser, than to let the ultimate determination of public policy rest in the hands of anyone who is beyond the reach of popular accountability. That proposition, unhappily, has not held its own in other countries during the past generation.

1. THE CONSTITUTION EMBODIES THE PRINCIPLE OF POPULAR SOVEREIGNTY.

The second outstanding feature of the Constitution is this: it is a grant of powers. It created a new government and endowed that government with a definite range of authority, making it supreme within its own sphere. Yet it left the state governments functioning — and likewise

[1] See W. B. Munro's *Makers of the Unwritten Constitution* (New York, 1930).

supreme within their own fields of jurisdiction. The framers of the American Constitution believed that two governments could be supreme, provided each was given its own sphere of action. So they proceeded to give the new federal government certain powers, both general and specific, to be exercised without interference by the states. All other authority they left to the states, to be exercised by them without interference on the part of the federal government, and any doubts that might arise on this point were resolved by the forthright phraseology of the tenth amendment.[1]

2. IT DIVIDES POWERS BETWEEN THE NATION AND THE STATES.

There is always a danger in setting up two related governments, each expected to whirl contentedly within its own orbit. Either the central government gets too little power and perishes from general debility, or it gets too much power and eventually crushes out everything else. The first of these two dangers was what beset the old confederation (1781–1787); the second brought about the collapse of the German republic in 1933. The makers of the American Constitution were at great pains to steer a course midway between these two pitfalls. They wanted a strong central government and strong state governments, with neither encroaching on the other. So they gave large powers to the new federal government, but took care to limit these powers. For example, they tried to assure the new federal government a reasonable revenue, but did not give it unrestricted power to tax; they empowered it to regulate foreign and interstate commerce, but not to interfere with commerce within the states; they authorized it to maintain an army, but left each state its own militia. To the states, as a counterpoise, they reserved nearly the whole field of civil and criminal law, the regulation of industry and labor within each state, the control of local government, the upbuilding of an educational system and many other far-reaching functions.

HOW THE ADJUSTMENT OF AUTHORITY WAS ARRANGED.

It has sometimes been said that the framers of the Constitution tried to give *all powers of a general nature* to the central government, while reserving *all powers of a local nature* to the states. That is not what they tried to do. Having in mind the experience of the states under the Articles of Confederation, they merely sought to give the new federal government those powers which experience had demonstrated to be essential. They conformed their work to facts, not to formulas. Look over the Articles of Confederation and put your finger on the weak spots. Note the things that needed to be done, but

A MISTAKEN IDEA.

[1] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

could not be done because no one had power to do them. You will find that the eighteen powers given to the new Congress are directly related to the lack of powers in the old one.

THE DIVISION OF POWERS IN DETAIL.

Here are the chief powers given by the Constitution to the federal government; and alongside are placed some of the most important things which, by the silence of the Constitution, were left largely or wholly to the jurisdiction of the several states:

Federal Powers	*State Powers*
1. Taxation for federal purposes.	1. Taxation for local purposes.
2. Borrowing on the nation's credit.	2. Borrowing on the state's credit.
3. Regulation of foreign and interstate commerce.	3. Regulation of trade within the state.
4. Currency and coinage.	4. Civil and criminal law.
5. Foreign relations and treaties.	5. The "police power."
6. Army and navy.	6. Education.
7. Postal service.	7. Control of local government.
8. Patents and copyrights.	8. Charities and correction.
9. Regulation of weights and measures.	9. Highways and traffic.
10. Admission of new states.	10. Organization and control of corporations.

THE BALANCE HAS BEEN FAIRLY WELL PRESERVED.

At the outset, the states got the better of the bargain; but the federal government has grown steadily stronger. And this, rather strangely, has taken place without reducing the amount of work which the state legislatures have to do. The amount of governmental work which has to be performed has grown so enormously that the state governments are far busier today than they were a hundred and fifty years ago. In 1787 some opponents of the Constitution predicted that the states would eventually be reduced to the status of mere districts for administrative purposes. They were wrong. Despite all that has happened in the intervening years, the original balance of powers has not been radically disturbed. The danger that it will be, as time goes on, is nevertheless one that must be reckoned with. The federal government has been steadily edging up in recent years.[1] After the constitutional convention had adjourned, someone said to Benjamin Franklin, "Well, Doctor, have you given us a republic or a monarchy?" "A republic," replied Franklin, "if you can keep it." Yes, that is the problem which never ceases to confront a great republic made up of lesser republics known as states — to keep the balance from being upset.

A third outstanding characteristic of the American Constitution is its

[1] See p. 363.

recognition of what has commonly been called the principle of separation of powers; in other words, the idea that the three organs of government — legislative, executive, and judicial — should be kept distinct and independent, each acting as a check on the others. The executive, according to this principle, should never legislate; and the legislature should never attempt to administer its own laws. The courts, again, should interpret and enforce the laws, but should have no hand in making or administering them.

3. THE PRINCIPLE OF SEPARATION OF POWERS.

The origin of this interesting doctrine has been commonly attributed to a French writer, Baron de Montesquieu, whose two volumes on *The Spirit of Laws* appeared in 1748. But the idea is as old as Aristotle.[1] Montesquieu merely gave it a broader and more emphatic expression, and through his writings the leaders of political thought in America were impressed by it. Here is the doctrine in Montesquieu's own words:

DERIVED FROM MONTESQUIEU.

> Political liberty is to be found only in moderate governments; even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. . . . In every government there are three sorts of power: the legislative, the executive, . . . and the judiciary power. . . . When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.[2]

MONTESQUIEU'S OWN STATEMENT OF THE DOCTRINE.

The great English jurist, Blackstone, also emphasized the desirability of separation. "In all tyrannical governments," he wrote in his famous *Commentaries*,[3] . . . the right of *making* and of *enforcing* the laws is vested in one and the same man, or are in the same body of men; and wherever these two powers are united together there can be no public liberty. . . . Were [the judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges. . . . Were it joined with the executive, this union might soon be an overbalance for the legislative."

BLACKSTONE'S ENDORSEMENT OF IT.

[1] "All states have three elements, . . . first, that which deliberates about public affairs; second, that which is concerned with the magistrates, and determines what they should be, over whom they should exercise authority, and what should be the mode of electing them, and thirdly, that which has judicial power." Aristotle's *Politics* (Jowett's edition, 1885), Vol. I, p. 133.

[2] *The Spirit of Laws*, Book XI, chaps. 4–6 *passim*.

[3] I, ii, 146; and I, vii, 269.

Now, a majority of those who framed the Constitution of the United States were lawyers and undoubtedly had studied Blackstone, as all lawyers did in those days. At any rate they respected his dicta as gospel, to be quoted as the last word on issues of legal or political philosophy. "No political truth," said Madison, "is of greater intrinsic value. . . . The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Jefferson, although absent from the constitutional convention, was equally explicit. "An elective despotism," he wrote, "is not what we fought for, . . . but one in which the powers of government should be so divided and balanced, . . . that no one could transcend the legal limits without being effectively checked and restrained by the others."

FRANKLIN AND THE ANALOGY FROM SCIENCE.

Wise old Benjamin Franklin also favored a scheme of government based upon the principle of separation of powers; but he was a scientist, not a lawyer, and reached his conclusion from a different starting point. For the idea fitted the general conception of the universe which Franklin and other men of science held in the closing decades of the eighteenth century. Scientists everywhere, in 1787, accepted the laws of Newtonian physics. They believed the universe to be a thing of checks and balances, with everything held to its proper orbit by the gravitational influence of other bodies. Mass and distance, properly adjusted, kept celestial bodies from colliding, to the destruction of one another. Hence it was easy for Franklin to accept the law of gravitation in government: the inevitable pull of large centers of authority upon smaller ones. The way to keep repositories of power within their own orbits was to give them the right adjustment of mass and distance. Government, in other words, might be looked upon as a mechanism, not as an organism. Properly adjusted at the start, it would stay adjusted.

COLONIAL EXPERIENCE.

But it is unlikely that Madison, Franklin, and the rest would have been much influenced by Montesquieu's aphorism, were it not for the fact that it seemed to have been verified right up to the hilt by the political experience of the thirteen colonies before the Revolution. The colonists had repeatedly protested against the interference of the colonial governors in matters of legislation, and there had been many controversies over the independence of the colonial judges. Looking back, it seemed as though most of the political troubles of the colonial era had arisen from a failure to keep these three branches of government separate. So, while no express enunciation of

the Montesquieu-Blackstone principle was incorporated in the national Constitution, the separation therein of legislative, executive, and judicial provisions into three independent articles is evidence that the idea was kept well in mind.[1]

Pushed to an extreme, the principle of separation of powers would, of course, prove unworkable. The absolute independence of the three great departments of government would inevitably produce a deadlock and bring governmental activities to a standstill. The framers of the Constitution realized this and made no attempt to secure a *complete* separation of legislative, executive, and judiciary, each from the others. They gave to the Senate, for example, the right to refuse confirmation of the President's appointments, thereby awarding it a share in the exercise of his executive power. On the other hand, they gave the President, through his veto, a check on legislation. Then, lest this presidential veto might prove too powerful a weapon, they permitted it to be overridden by a two-thirds vote of both Houses. Again, they assured the judges a life tenure, but made them removable by impeachment. While desirous of creating an independent judiciary, they nevertheless gave Congress power to determine the number of judges and fix their salaries. They gave the President the power to negotiate treaties, but made a two-thirds vote of the Senate necessary for approval. While thus establishing various checks and balances, they took care not to make them too rigid. They separated powers, but they also provided lines of connection.

COMPLETE SEPARATION OF POWERS NEITHER PRACTICABLE NOR DESIRABLE.

It was well that they did so, because in times of emergency it becomes essential for all three branches of the government to work in unity under a single leadership. During the period of America's participation in the First World War (1917–1918), for example, the executive branch of the government took command and virtually dominated congressional lawmaking; but, when the emergency was past, Congress at once resumed its position of independence; and the Senate asserted a dominant voice, not merely an assenting one, in the making of a postwar treaty. So, likewise, in 1933, President Franklin D. Roosevelt not only took into his own hands the leadership in national lawmaking but sent to Congress, straight from the White House, a program of "must" legislation which went through with drumfire rapidity. Much of this legislation transferred to the President various powers which Congress had hitherto kept jeal-

[1] Notice the wording: "All legislative powers herein granted shall be vested in a Congress of the United States" (Art. I, Sec. 1). "The executive power shall be vested in a President of the United States" (Art. II, Sec. 1). "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (Art. III, Sec. 1).

ously within its own jurisdiction. In a word, the principle of separation of powers continues as a constitutional theory to which the normal practice of American government conforms; but, when emergencies arise, it is not permitted to stand in the way of prompt and forceful action.

Yet, there are limits beyond which the breaking down of the division cannot be permitted to go. Congress can delegate to the President a great deal of power when the need arises; but it cannot abdicate into his hands the power to make the laws of the land. This point was unanimously decided by the Supreme Court in 1935, when it invalidated the National Industrial Recovery Act. This statute authorized industries to make "codes of fair practices," and provided that, when promulgated by the President, these codes should have the force of law. The Court held that this was an unconstitutional delegation of the legislative power of Congress.[1] The Constitution does not permit the laws of the land to be made by representatives of industry, even with the President's approval.

A fourth distinguishing feature of the American Constitution is its tacit recognition of the principle of judicial supremacy.[2] In every sovereign state there must be a supreme authority whose determinations are final and not subject to be overruled. In England at the time the Constitution of the United States was framed, this supremacy rested with parliament. In other words, England had adopted the principle of "legislative supremacy." But that is just what the framers of the Constitution wanted to avoid. Experience with repressive acts of parliament in the days before the Revolution had impressed upon them the belief that it is the habit of all legislative bodies to grasp and exercise powers that do not belong to them. So they set boundaries to the powers of Congress; and it was their intent that these limitations should be observed. But how was such observance to be enforced? By the courts? The statesmen of 1787 did not categorically answer that question.

4. THE DOCTRINE OF JUDICIAL SUPREMACY.

Yet the issue was bound to arise, for it is impossible to conceive of two sets of governments, working side by side, each supreme within its own field, but without any recognized agency for settling disputes between them. This power to speak the last word in matters of jurisdiction could not be given to Congress — the states would not have tolerated it. Nor could it be lodged with the state legislatures, for that would have resulted in a chaos of interpretations. And

DID THE FRAMERS INTEND TO MAKE THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?

[1] For a further discussion, see pp. 444–446.

[2] For a full discussion of this topic, see p. 570, and the references given at the close of Chapter XXXV.

when controversies should arise between the President and Congress, as to their respective powers, who would serve as the umpire? Was it intended to have the Supreme Court take upon itself the guardianship of the Constitution, interpreting it and ensuring its supremacy by declaring void any act of Congress that might overstep the allotted bounds of its authority? Was it intended that the Supreme Court should be supreme to the extent of being authorized to declare acts of Congress, acts of the state legislatures, and actions of the President unconstitutional?

A HARD QUESTION TO ANSWER.

The Constitution itself is silent on that question; it contains no express provision that the Supreme Court should or should not pronounce the last word on questions of constitutionality. Nor do the debates in the constitutional convention throw much light on what the makers of the Constitution may have intended. In the Virginia plan a proposal was laid before the convention providing for a "council of revision," made up of "the executive" (presumably the President and the Vice-President), together with "a convenient number" of federal judges. This council was to scrutinize laws passed by Congress, and any measure to which it objected would be void unless reenacted in Congress by an unspecified majority. The convention did not like this proposal and rejected it in favor of a simpler method which gave the veto power to the President alone. In the course of the debate something was said about the inadvisability of giving judges power to override the law. "The judges of Aragon," remarked John Dickinson, "began by setting aside laws and ended by making them." But the convention never faced the definite issue of judicial supremacy, never discussed it, and never voted on it.

ONE SIDELIGHT ON THE MATTER.

What the convention would have decided if the problem had come before it in point-blank fashion, we have no way of knowing.[1] We do know, however, that the leaders of the convention were familiar with many cases in which colonial laws had been declared void by the Privy Council in England; and they were also aware of the action of state courts in declaring state laws unconstitutional — in the Rhode Island case of Trevett *v.* Weeden, for example.[2] Hence the idea that a court could declare a law unconstitutional was by no means unfamiliar to them. And Alexander Hamilton,

[1] Professor Charles A. Beard, after a careful study of all the evidence, is convinced that a majority among the leaders of the convention believed the right and duty of passing upon the constitutionality of laws to be within the authority of the Court. See his book on *The Supreme Court and the Constitution* (New York, 1912).

[2] J. B. Thayer, *Cases on Constitutional Law* (2 vols., Cambridge, 1895), Vol. I, pp. 73–78. There is a good discussion of this whole subject in Edward Channing, *History of the United States* (6 vols., New York, 1905–1925), Vol. III, pp. 498–507.

in urging the ratification of the Constitution by the states, plainly affirmed that the Constitution intended the judicial power to serve as an intermediary "between the people and the legislature," in order "to keep the latter within the limits assigned to their authority." [1] It is not unfair to assume, therefore, that if the convention had been strongly averse to the idea of judicial review, it would have gone on record against it.

THE OUTCOME.

In government, at any rate, it is acts, not intentions, that count. What the framers of the Constitution intended is of less practical consequence than what the Supreme Court has done. The Constitution certainly gave this tribunal an opportunity to take upon itself the function of declaring national laws unconstitutional. And the Court, under the leadership of Chief Justice John Marshall, seized this opportunity, assumed the right to say the last word on questions of constitutionality, and possesses that right today.[2] Moreover, it is hard to see how the Constitution could have acquired much binding force if the Supreme Court had not done as it did. Without some body to enforce its provisions, a constitution has nothing but moral force behind it; and the history of new governments everywhere indicates that constitutional guarantees require something much stronger than moral sanctions if they are to be upheld.

5. THE THEORY OF CONSTITUTIONAL LIMITATIONS.

A fifth outstanding feature of the American Constitution is found in the number and strictness of the limitations which it contains. It is full of them. There are many things which neither the national nor the state governments may do, such as passing bills of attainder or granting titles of nobility. There are some things which the national government may do, but which the state governments may not — issue paper money, for example. Likewise, there are things which Congress must not do, but which the states are at liberty to do if they please.[3] Thus every branch of American government is limited. Whether all the limitations which appear in the Constitution of the United States have really served a

[1] *The Federalist*, No. 78. "The interpretation of the law," said Hamilton, "is the proper and peculiar function of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law."

[2] It assumed, for the first time, in 1803 (Marbury *v.* Madison, 1 Cranch, 237) the power of declaring laws of Congress unconstitutional; but the acts of state legislatures were held unconstitutional as early as 1791 by the circuit court and as early as 1796 (Ware *v.* Hylton, 3 Dallas, 199) by the Supreme Court. In view of the language of the Constitution (Art. VI, par. 2), judicial review of state legislation aroused no protest.

[3] These last-named limitations are for the most part in the bill of rights, or first ten amendments. They have been held applicable to the federal government only and not to the state governments unless the state constitutions have copied them, as has been done in some cases. Yet in such recent cases as Gitlow *v.* New York, 268 U. S. 652 (1925), and Near *v.* Minnesota, 283 U. S. 697 (1931), the court has applied some of these rights against the states under the "due process" clause of the fourteenth amendment.

useful purpose is a matter to be discussed in another chapter; but in any case they form a significant feature of the document.

Finally, the Constitution of the United States is distinctive not only for what it contains, but for what it omits. Its silence on some points is eloquent. It goes into detail on quite incidental matters such as the calling of the Yeas and Nays in Congress and the exact wording of the oath which the President must take at his inauguration, but omits all reference to many fundamental features of American politics. There is not a word, for example, about corporations, banks, immigration, education, civil service, political parties, budget-making, agriculture, labor, and the regulation of industry. The Constitution indeed contains fewer references to economic and social matters than does the organic law of any other country. Even on political matters it shows some strange omissions.

6. THE CONSPICUOUS OMISSIONS.

For example, it provides that the House shall choose its own Speaker, but does not say what his powers shall be. It requires the assent of both Senate and House for the enactment of laws, but says nothing about how a disagreement between these two chambers shall be settled. It makes provision for a president pro tempore of the Senate, but no provision for a secretary of state. It goes into detail about the appointment of federal officials, but overlooks the matter of removing them from office, except by impeachment. Happily, however, the powers given to Congress are couched in such broad terms that they have enabled most of these omitted matters to be dealt with by law. Were it not for this element of flexibility, the Constitution would have been more frequently amended during the past fifty years, and the amendments would have been of wider scope.

The silences of the Constitution are not altogether to be regretted. Its framers could not forecast the social and economic problems that would arise in the days of their great-grandchildren. They were too practical to concern themselves with any such futility, and anyhow they had more urgent things to do. For the moment they were trying to pull the country out of a depression, restore its prosperity, make it safe for decent citizens to live in, able to pay its debts, and worthy of respect from the rest of the world. That was a big enough job for fifty-five delegates. As for the future, they provided no fewer than four different ways by which the Constitution could be amended whenever the need might arise. They were at great pains to make certain that neither Congress alone, nor the state legislatures alone, would ever be able to keep the Constitution from being changed. It was their thought that changes in the Constitution would be made freely,

REASONS FOR THESE OMISSIONS.

year by year, and that the whole document might be revised from time to time.

These are the notable features of the national Constitution. Not one of them was wholly new in 1787. The doctrine of popular sovereignty had been preached by John Locke and Tom Paine. The idea of a constitution as a grant of powers is as old as the Lycian Confederacy, while the principle of separation of powers harks back to Polybius and Aristotle, not to speak of Montesquieu and Blackstone. The doctrine of judicial supremacy and the idea of placing constitutional limitations upon the powers of legislatures were both evolved out of English and American experience in the years before the Constitution was drawn. Limitations on governmental authority were as ancient as Magna Carta. Bills of rights were familiar to Englishmen. Silences and omissions in a fundamental law were old acquaintances, for the colonial charters and earliest state constitutions had been full of them.

CONSTITUTION EMBODIED FEW WHOLLY NEW PRINCIPLES.

So, the Constitution of the United States, in its outstanding features, was not designed to be an array of novelties in government, now put to the test for the first time. The colonists had brought English institutions to America, set them up over here, modified them, improved them, and made them serve new needs. The men who made the Constitution had over one hundred and fifty years of New World political experience behind them. Thirteen colonies had tried all sorts of things during that century and a half. Finally, the experience under the Articles of Confederation had been the most enlightening of all. Accordingly, the framers of the Constitution, most of whom had served in public office, did not need to go outside the range of their own personal knowledge in order to decide what was worth a further trial. From foreign lands they took almost nothing. The experiences of ancient confederacies, mediaeval republics, and eighteenth-century absolutisms were instructive mainly in showing them what to avoid.

THE DEBT TO ENGLAND.

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BRIEFER STUDIES. Among single-volume surveys the most useful are Charles K. Burdick, *Law of the American Constitution* (New York, 1922), Charles W. Gerstenberg, *American Constitutional Law: Text and Leading Cases* (New York, 1937), John M. Mathews, *The American Constitutional System* (revised edition, New York, 1940), Henry Rottschaefer, *Handbook of American Constitutional Law* (St. Paul, 1939), A. C. McLaughlin, *Foundations of American Constitutionalism* (New York, 1933), and B. A. Arneson, *Elements of Constitutional Law* (New York, 1928). Samuel P. Orth and Robert E. Cushman, *American National Government* (New York, 1931), is largely devoted to a discussion of constitutional interpretations. Brief commentaries on the contemporary construction of the various clauses of the Constitution may be found in Edward S. Corwin, *The Constitution and What It Means Today* (7th edition, Princeton, 1941), and F. A. Magruder and Guy S. Claire, *The Constitution* (New York, 1933). Attention is also called to *The Constitution of the United States*, with annotations, published by the government printing office (Washington, 1938).

CASE BOOKS. The study of the American Constitution is largely a study of constitutional decisions. There are several good compilations of these decisions, such as J. P. Hall, *Cases on Constitutional Law* (new edition, St. Paul, 1926), L. B. Evans, *Leading Cases on American Constitutional Law* (5th edition by Charles G. Fenwick, Chicago, 1942), O. P. Field, *A Selection of Cases and Authorities on Constitutional Law* (2nd edition, Chicago, 1936), D. O. McGovney, *Cases on Constitutional Law* (2nd edition, Indianapolis, 1935), Joseph R. Long, *Cases on Constitutional Law* (Rochester, N. Y., 1936), Noel T. Dowling, *Cases on American Constitutional Law* (Chicago, 1937, with Supplements in 1940 and 1941), and W. F. Dodd, *Cases and Materials on Constitutional Law* (3rd edition, St. Paul, 1941). A useful smaller collection of cases is R. E. Cushman, *Leading Constitutional Decisions* (7th edition, New York, 1940).

CHAPTER V

HOW THE CONSTITUTION HAS CHANGED

Thus the American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit. — *Lord Bryce.*

Some years ago President Franklin D. Roosevelt, in a moment of irritation, spoke of the Constitution as a "relic of horse-and-buggy days," with the implication that it is no longer suited to the needs of the nation. But to characterize it in that way is to disregard the all-important fact that the Constitution, although bearing the datemark of 1787, has been steadily changing, developing, expanding, and adapting itself to new conditions throughout all the intervening years. One might just as fairly designate the White House itself as a relic of horse-and-buggy days, for it was built more than a hundred years ago. Of course it has been modernized; almost every President has made some changes in it, until today it serves its purpose as well as it ever did. Exactly the same thing is true of the Constitution.

AN INAPPROPRIATE CHARACTERIZATION.

In neither case is the edifice of today much like the original. The overhauling has been, in both cases, an almost continuous performance. One must not look on the national Constitution as a series of paper formulas which have remained intact and unaltered since the closing years of the eighteenth century. It would be nearer the truth to say that from the time of its adoption there has never been a single year in which something in the original document has not had its meaning changed. It has been amended constantly, and, strange as the statement may sound, most of the amending has been done without adding amendments.

To illustrate this paradox, take the growth in the powers of Congress during the past fifteen years. Without formal amendment of the Constitution it has been possible for Congress to legislate for the entire banking and credit system of the country; likewise, to provide for the guarantee of bank deposits, reduce the gold content of the dollar, give large grants-in-aid to the states, regulate the stock exchanges, establish a system of social

AMENDING WITHOUT AMENDMENTS.

security, fix the prices of food, restrict the use of gasoline, enforce collective bargaining, engage in hydroelectric enterprises on a large scale, and do all manner of things which the Constitution does not expressly authorize it to do. These are powers which the Constitution gives to Congress by implication; in other words, they are incidentally dug out of the express powers. The phraseology of the original document remains unchanged, but it has been stretched to meet new conditions.

THE WIDE DEPARTURE FROM THE ORIGINAL PHILOSOPHY.

The Constitution is as flexible as the nation's methods of business. It is not merely a roll of parchment reverently treasured in the archives at Washington, printed in the appendix of every textbook, and committed to memory by a few precocious schoolboys to win an American Legion prize. It is not static but dynamic, a Darwinian, not a Newtonian affair. One might almost say that it is amended every Monday morning, when the Supreme Court hands down its decisions. The Fathers of the Republic, were they to rise from their narrow cells, would not recognize their handiwork, so greatly have all its implications been changed. How would Alexander Hamilton feel, were he to look from the gallery at one of our national party conventions and be told that this is the way we proceed to choose a President under a constitution which he approved? What would James Madison think of our vast array of federal reserve banks, national banks, and farm loan banks — not to speak of bank deposits guaranteed by the federal government, home-owners' loan corporations, and a host of other credit concerns — all established under the authority of a constitution which contains not a word about bank deposits, commercial credits, or farm mortgages? To ask that question is to answer it.

THE CONSTITUTION IN ITS BROADER SENSE.

What, then, is the Constitution of the United States in its present-day significance? Briefly, it is made up of contributions from six different sources. These are: (a) the original document; (b) twenty-one amendments; (c) hundreds of statutes which provide details for the general provisions of the Constitution; (d) thousands of judicial decisions interpreting the Constitution and the aforementioned statutes; (e) executive orders which fill in the details of statutes; and (f) a countless host of usages, customs, precedents, traditions, and even administrative opinions, which have acquired constitutional strength. These various factors in the enlargement of the Constitution should be explained one by one; but not in the order above given, for it will better serve the interests of clarity to speak of the statutes, decisions, and usages before dealing with the process of formal amendment.

DEVELOPMENT BY LAW

The simplest way of expanding the Constitution is by passing a law. Many matters, in fact, were left by the framers of the Constitution to be handled in that way. Knowing that they could not anticipate all contingencies, they did not try to do so, but trusted that future Congresses would enact such detailed provisions as might be needed.

HOW THE ORIGINAL CONSTITUTION HAS DEVELOPED: 1. DEVELOPMENT BY LAW.

And during the past century there has been a tremendous development through this channel. The whole structure of the subordinate federal courts is provided for by statutes, and so is the procedure of these courts. The succession to the presidency, in the event that the Vice-President is not available, is similarly arranged by the Presidential Succession Act of 1886. Again, there is scarcely a word in the Constitution relating either to the President's cabinet or to the organization of the various executive departments. True, there is mention of "heads of departments," but not a word about how many departments, or how they should be organized, or what functions should be performed by them. All such matters were left to be settled by law.

SOME EXAMPLES: (a) ORGANIZATION OF THE COURTS, ETC.

Similarly the present method of governing territories and insular possessions, such as Alaska and Hawaii, rests upon law and not upon constitutional provision. Likewise, the methods by which members of Congress are nominated,[1] and even the determination of who shall vote at congressional elections, are left to be arranged by the laws of the several states. The Constitution gives Congress power to borrow money on the credit of the United States. To facilitate such borrowing, a long series of laws was passed, authorizing the establishment of banks and regulating their methods of doing business. But the banks eventually got into trouble; and another law was passed (1933) providing for the guaranteeing of their deposits by a government agency. Thus the original power to borrow has been extended by law to the safeguarding of depositors' funds in privately owned banks. So with the budget. No provision for a national budget is made in the Constitution. The whole budget procedure is established by law.

(b) THE MECHANISM OF GOVERNMENT.

Even the procedure in lawmaking has had to be built up without much guidance from the written provisions of the Constitution. The

[1] Subject to overriding legislation by Congress (Art. I, section 4, and seventeenth amendment of the Constitution).

Constitution, for example, does not say a word about committees in Congress, who shall appoint them or what they shall do. It does not even require that bills be given three readings, or placed on the calendar, or signed by the presiding officer of either House. And of course it says nothing of filibusters, closures, riders, time limits, lobbying, leave-to-print, suspension of rules, and the other incidents of modernized legislation.

(c) THE PROCESS OF LAWMAKING.

Concerning the actual, present-day workings of the federal government, therefore, one cannot get any adequate knowledge merely by studying the words of the Constitution itself. By far the greater portion of what the student of government desires to know is not there. It is set forth in the statute books and in the numerous volumes of administrative regulations. To use Woodrow Wilson's metaphor, the Constitution is "only the sap center of a system of government vastly larger than the stock from which it has branched." By statutes passed under the authority of constitutional provisions, and by regulations issued under the authority of these statutes, we have determined how commerce may be carried on, how aliens may be naturalized, how patents and copyrights may be obtained, how the census shall be taken, how employers must bargain with their workers, how much wheat a farmer may raise, and how much you pay in postage on an air-mail letter. It is decreed in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States"; and Congress has not confined itself to a direct use of this authority. It has devolved upon various executive officials and administrative boards the power to supplement statutes by regulations and orders. These regulations are not laws, but they have the force of law. They are, as it were, the twigs on the branches which have sprung from the main trunk, which is the Constitution.[1]

DEVELOPMENT BY INTERPRETATION

In the second place, the Constitution has been developed by judicial and administrative decisions. The theory is that courts merely interpret and apply the printed words of constitutions without adding anything or taking anything away. Yet every lawyer knows that to give a phrase a new interpretation is to give it a new meaning; and to give it a new meaning is to change it. The Supreme Court of the United States has read into the American Constitution many things which are not there visible to the naked eye. It has read out of the Constitution other things which are there as plain

2. DEVELOPMENT BY JUDICIAL DECISIONS.

[1] For a further discussion of executive orders and administrative regulations see pp. 197–198.

as print can make them. Mr. Justice Holmes once blurted out the truth when he said that judges "do and must legislate." So, notwithstanding the limitations of juristic theory, the Supreme Court of the United States has done a great deal of actual lawmaking during the past hundred years.

It has done this by giving its own interpretation of provisions, phrases, and words in the original document. "Congress," the Constitution declares, "shall have power . . . to regulate commerce. . . ." But what is included within the term "commerce"? The Supreme Court has rendered at least a hundred decisions in answer to that question. This is because changes in the methods and materials of commerce give rise to new situations and problems almost every year. It has been the work of the Supreme Court, through its power of judicial interpretation, to twist and torture the term "commerce" so that it will keep step with the procession. Thus it has upheld Congress in the extension of its commerce power to railroads, motor stages, telegraph and telephone companies, airplanes, steamship lines, radio broadcasting stations, stock exchanges, and even ordinary industrial concerns which do business in more than one state.[1]

SOME EXAMPLES:

(a) REGULATION OF COMMERCE.

But there are limits to the flexibility of the commerce clause. When Congress in 1933 passed the National Industrial Recovery Act, it sought to widen the commerce power to a point where it would permit federal control over wages, hours, and methods in industries which conducted their business wholly within a single state. It did this by setting up the the theory that, while such industries were not themselves engaged in interstate commerce, their activities had an indirect influence upon other industries which were so engaged. But the Supreme Court in the Schechter Case (1935) declined to permit this sweeping extension of the commerce power.[2]

Or take another illustration. The Constitution provides that Congress shall have power "to raise and support armies." These five words looked safe enough in 1787. To the minds of the men who put them in the Constitution, they meant that Congress might call up volunteers, furnish these soldiers with muskets, feed them, clothe them, and not leave them to go cold and hungry as the Continentals had gone at Valley Forge. But the quintet of words has been swollen with the lapse of time. They have proved broad enough to authorize the drafting of men by the million, even in time of peace. To support armies, moreover, means to feed them, to supply them with

(b) WAR POWERS.

[1] See pp. 399–403.

[2] Schechter Poultry Corporation *v.* United States, 295 U. S. 495.

munitions, and even to require that the civilian population undergo sacrifices in order that the armies can be fed and supplied with adequate implements of warfare. Power "to raise and support armies"! The federal government, with the Supreme Court at its right hand, can wring a vast amount of authority from these five words.

Here we have, therefore, a powerful agency of verbal elongation. To find out what any word in the American Constitution means, you do not look in a dictionary. You look in a digest of judicial decisions. There you find what it means in its legal sense, which is often quite different from what it means in everyday English. The Supreme Court of the United States has ruled that telegrams are instrumentalities of commerce while bills of exchange are not; that primaries are elections;[1] that ex post facto laws do not include all retroactive laws; and that the phrase "due process of law" means a great deal that a layman would not understand it to mean.[2]

WORDS AND THEIR LEGAL MEANINGS.

So, the student who desires to know what the words of the Constitution really mean will find Daniel Webster a better guide than Noah Webster. If he wants to find out what the actual powers of Congress are today, he will get a poor idea of their scope and ramifications by merely surveying the eighteen formal powers which are granted in the words of the Constitution itself. Supreme Court decisions have widened these original powers beyond recognition; yet never in a single instance has the Court claimed the right to make any change in the phraseology. "It does not put new things in the Constitution, but merely finds new things there." The stretching of a phrase in one decision gives a foundation for some further elasticity in the next; the lines of development are pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began. And the Court's latest decision stands until the next one comes. "That isn't a correct interpretation of the Constitution," remarked a Supreme Court justice in rebuke to a young lawyer who was arguing a case before that august body. "Well, it was — until Your Honor spoke," came the conciliatory reply.

THE STEADY EXPANSION OF WORDS AND PHRASES IN THE CONSTITUTION.

And it is not the courts alone that interpret the Constitution. Heads of departments and other administrative officers are often confronted with the necessity of acting quickly, even though their constitutional powers are not clear. Their actions may be challenged and subjected to judicial review, but often they are accepted without any such protest. In that

[1] U. S. *v.* Classic, 313 U. S. 299 (1941).

[2] For a discussion of this phrase, see pp. 519–523.

case, the action forms a precedent for the future. And when any administrative interpretation of a constitutional clause has been allowed to pass for a long time unchallenged, and particularly when important public and private rights have become based upon it, the courts will not usually go out of their way to break things open. In recent years there have been many executive orders and administrative rulings which virtually operate as agencies of constitutional change. It should be mentioned, however, that these orders and rulings are not issued, in the main, without legal advice. The office of the attorney general is usually asked to give its opinion on the probable constitutionality of important administrative orders before they are issued. Of course it is quite impossible for the attorney general to pass on all such questions, so he refers them to one of his numerous assistants. Thus it comes to pass that matters of considerable importance relating to the powers of public officials under the Constitution are virtually determined by some young lawyer in the attorney general's office.[1]

THE CONSTRUING OF CONSTITUTIONAL PROVISIONS BY ADMINISTRATIVE RULINGS.

DEVELOPMENT BY USAGE

In the third place, the Constitution has been developed, expanded, and modified by usage or custom. What habit is to the individual, usage is to the state. Nations, like men, get into the habit of doing things in a given way. Habit then hardens into usage, which becomes difficult to change. So, like a pyramid reared upon the written Constitution, there has been built up in America a body of political customs and usages which have their basis neither in laws nor judicial decisions, but are merely the result of long-continued habit. This habit-forming process goes on continually. Usage is always at work — adding, subtracting, altering, and influencing the substance of the written Constitution and the laws. It has given us, in considerable measure, an "unwritten Constitution."

3. DEVELOPMENT BY USAGE.

What are some of the usages that have modified, developed, and fixed the political institutions of the United States? The most striking one, perhaps, concerns the method of electing the President. Here the written provisions of the Constitution have been so greatly altered by usage that a literal reading of them gives, in some cases, an impression which is wholly at variance with the realities. The Constitution provides that the presidential electors shall meet in their several states;

SOME EXAMPLES: (a) THE ACTUAL METHOD OF ELECTING THE PRESIDENT.

[1] These *Opinions of the Attorney General* are published and have become increasingly important as a source of information on matters of constitutional interpretation.

and it was assumed that they would survey the whole field before casting their votes. Not a word is said about nominating presidential candidates in advance, or pledging the electors. Nothing of that sort was contemplated. But political parties came into the field and began nominating their candidates, and soon the electors found themselves with virtually no choice but to vote for these candidates. They became human robots with a purely mechanical function, and they now form an inconsequential cog in the machinery of election.

Yet, as a matter of law, there is nothing to prevent their doing just what the Constitution contemplated. It is merely that usage has become stronger than the Constitution itself. Under normal conditions the President of the United States is now as directly chosen by the voters of the states as though there were no intervening electors at all. In other words, there has developed precisely what the architects of the Constitution sought to avoid. They did not desire the direct, popular election of the nation's chief executive, and they exerted themselves to devise a scheme for preventing it.

There are some cases, on the other hand, in which usage prevents what the Constitution permits. For example, there is nothing in the original Constitution to debar the election of both the President and the Vice-President from the same state. At first glance the twelfth amendment might seem to stand in the way of such a choice, but if you will read the first few lines of it carefully you will see that it does not. Nevertheless, the President and Vice-President have never been chosen from the same state at the same time, and probably never will be. Custom dictates that they shall be nominated not only from different states but from different regions of the country. So it is with candidates for election to the national House of Representatives. The Constitution merely requires that a member of Congress shall be a *resident of the state* from which he is chosen. But usage goes further and virtually requires that he be a *resident of the district* which chooses him.

THE USAGE WITH RESPECT TO RESIDENCE.

The way in which usage may operate in government without most people realizing it was strikingly shown when President Wilson went to the Paris Peace Conference in 1918. During his absence he asked Vice-President Marshall to preside at cabinet meetings. At once the Washington newspaper correspondents began thumbing the pages of the Constitution in quest of his authority to do this. And of course they found nothing. For the simple fact is that, so far as the Constitution and laws of the United States are concerned, the President can call to his cabinet, at any time and for any purpose,

(b) THE CABINET.

anybody he pleases. He could take all the White House employees into his cabinet, so far as the Constitution goes. He can ask the Vice-President or anyone else to preside at cabinet meetings: he could even discontinue these meetings altogether. For there is nothing at all in the Constitution relating to the cabinet. There is a provision which says that the President "may require the opinion, in writing, of the principal officer in each of the executive departments," but not a word about meetings held by these principal officers or anyone else at the President's behest. So the cabinet is whatever the President chooses to make it. The practice of calling the ten heads of departments into a weekly conference is purely a matter of usage.

(c) THE MACHINERY AND WORK OF POLITICAL PARTIES.

But the most important development which has come about in the field of American government as the result of usage is embodied in that complicated fabric which we call the party system. The leading statesmen of 1787 looked upon the rivalry of political parties as a thoroughly vicious feature in free government; hence the Constitution contains no mention of caucuses, primaries, conventions, platforms, party committees, campaign funds, and the other paraphernalia of modern party politics. Nevertheless, political parties sprang into existence almost at the outset and gradually became dominating factors in the work of the new federal government. The whole party system as we now know it — its organization, personnel, and methods, its manipulations both in Congress and outside — all this has been developed in the realm of unwritten law.[1] Only in recent years have the laws of Congress attempted to regulate party organizations; and even yet these regulations go but a little way. Usage has created and maintains the party system, but who will say that party organizations do not profoundly affect both the constitutional practices and the political life of the American people?

(d) OTHER EXAMPLES.

Various other examples of institutions and practices which owe their existence to the same source might be given. Custom, during a century and a half, maintained the principle that no President should have more than two consecutive terms. Why do all American ambassadors tender their resignations when a new administration comes in? Why are many appointments in the federal service treated as "political patronage"? Why does the Supreme Court hand down its decisions on Monday, and why are elections almost always held on Tuesday? Why are the heads of the war and navy

[1] This refers to parties solely in the field of their national activity. Regulation by state law has become most elaborate even where the nomination and election of federal officers are concerned.

departments chosen from civilian life and not from these professional services? Why is the head of the nation addressed simply as "Mr. President" while the governor of Massachusetts is styled "His Excellency" and the mayor of New York is "His Honor"?

Even usages, however, may change. President Franklin D. Roosevelt successfully challenged the third-term doctrine in 1940. For a full century after the administration of John Adams, no President ever read his messages to Congress. The custom was to send them in writing by messenger. But President Wilson changed this custom, setting aside the precedents of a hundred years, and the new practice has been continued by some of his successors. From Washington to Taft, moreover, no President during his term of office ever left the jurisdiction of the United States. But President Wilson shattered this continuity of practice by going to Europe, and President Franklin Roosevelt more than once set foot on alien soil. One must not conclude, however, that usage is a frail reed easily broken. Now and then individual usages are snapped, but most are tough in the fiber.

GROWTH BY AMENDMENT

Finally, the Constitution has been developed by formally amending it. Its framers foresaw that the need for amendments would arise from time to time, and they tried to make the process of amendment, as they thought, a fairly simple one. In this spirit, they provided four alternative methods of putting through an amendment. They made it possible to initiate an amendment either in Congress or outside Congress. They provided for ratification by state legislatures or, as an alternative, by special conventions. It was certainly not foreseen by them that with an increase in the size of Congress, and in the number of the states, the process of amending the Constitution by any of these methods would automatically become more difficult. Nor was it anticipated that only one of the four amending methods would be used to the virtual exclusion of the other three. But the first ten amendments were proposed in a batch by Congress and submitted to the state legislatures as the quickest way of getting them ratified. This action set a precedent which was followed in the case of all later amendments down to the twenty-first. In that instance ratification was made by conventions instead of by the state legislatures.

4. DEVELOPMENT OF THE CONSTITUTION BY FORMAL AMENDMENT.

As for the procedure in making amendments to the Constitution, it cannot be more concisely described than by using the words of the document itself:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . .[1]

Now while the above-quoted sentence is a pretty long one, and would probably get the blue pencil from a teacher of English composition, it contains no wasted words. Like many other provisions of the Constitution, however, it avoids going into details and consequently leaves some questions unanswered. Does the phrase "two thirds of both Houses" mean two thirds of all the members, or two thirds of those present? The latter interpretation has prevailed. Does the action of Congress, in voting to propose a constitutional amendment, require the assent of the President? The Supreme Court has held that it does not. When a state legislature has ratified a proposed constitutional amendment, may it later (before the necessary three fourths has been obtained) rescind its action? Congress, by a joint resolution, has declared that this cannot be done. On the other hand, a state legislature may first refuse to ratify, and then, at a later date, change its mind.[2] And when a state legislature votes to ratify an amendment its action is not subject to veto by the governor.

SOME QUESTIONS RELATING TO THE PROCESS OF AMENDMENT.

Then there is the question whether Congress, in proposing an amendment, may fix a limit of time within which the ratification must be completed. This Congress did, for example, in the case of the eighteenth, twentieth, and twenty-first amendments, fixing seven years as the maximum time for ratification in each case. The Supreme Court has held that this is allowable.[3] Finally, may a state legislature, when a proposed amendment comes before it for ratification, submit the question to the people by referendum? Of course there is nothing to prevent the submission of the question to the people, provided the legislature itself takes formal action after the people have expressed themselves; but a state legislature may not submit an amendment to the people for final decision, thus abdicating its own powers.[4]

TIME LIMITS ON RATIFICATIONS.

When Congress initiates a proposed amendment, the secretary of state sends a certified copy of it to the governor of each state and he, in turn,

[1] Article V.
[2] Coleman *v.* Miller, 307 U. S. 433 (1939).
[3] Dillon *v.* Gloss, 256 U. S. 368 (1921) and Coleman *v.* Miller.
[4] Hawke *v.* Smith, 253 U. S. 221 (1920).

transmits it to the legislature. Then when the legislature ratifies the amendment the governor so certifies to the secretary of state in Washington and the latter, on receiving certificates from three fourths of the governors, proclaims the amendment to be in force.[1]

CERTIFICATION OF AMENDMENT.

A final question: is there any provision in the Constitution which cannot be changed by amendment? This question is difficult to answer with a Yes or No, because, while the Constitution expressly declares itself to be unamendable on two points, it is impossible to conceive of an unamendable Constitution as anything but a contradiction in terms. For a Constitution is a manifestation of popular sovereignty; and one generation of the people can hardly impose, for all time, a limitation upon the sovereignty of future generations. That would constitute government by the graveyards. Therefore, it is quite likely that, if conditions ever make it imperative to amend the Constitution on either of the two points at issue, a way will be found to do it. Indeed, one way is obvious: to remove the exception by a preliminary amendment and thus clear the way for further action.

BARRIERS TO AMENDMENT.

What are these two unamendable provisions? One is the stipulation that no state, without its own consent, shall ever be deprived of its equal representation in the Senate. In this respect, New York and Nevada must continue free and equal, although they are hardly so in anything else. The other provision is that no state shall be divided, nor shall any two states be combined, without the consent of the state legislatures concerned.[2] If the country ever decides to put an end to the undue influence of the small states in Congress, caused by their overrepresentation in the Senate, it can achieve this end in a roundabout way. An amendment could provide that when the House and Senate disagree they must settle the disagreement, not by conference and separate concurrence as at present, but by holding a joint session.

Only twenty-one amendments to the Constitution have been adopted in more than one hundred and fifty years. The number is really smaller because the first ten amendments, which were all submitted at the same time, might just as well have been combined into a single one. The remaining eleven amendments fall into three groups. The eleventh and twelfth were designed to remedy ambiguities and defects in the original Constitution — perfecting amendments, they might be called. The

THE FIRST TEN AMENDMENTS.

THE ELEVENTH AND TWELFTH.

[1] An amendment becomes effective before promulgation, however, and at the moment when ratification has been completed. Dillon *v.* Gloss, 256 U. S. 368 (1921).

[2] This is inserted in the Constitution as a limitation upon the powers of Congress; but it operates as a limitation upon the power to amend the Constitution.

eleventh was a direct result of a Supreme Court decision (Chisholm *v.* Georgia) which held that a citizen of one state could sue another state in the federal courts, under the constitutional provision which extended the judicial power of the federal government to "suits between a state and citizens of another state." This affirmative interpretation of the judicial power aroused the champions of states' rights, who bestirred themselves successfully to have the legal immunity of the states made clear. The other amendment, the twelfth, was proposed and adopted because the presidential election of 1800 demonstrated the danger of a deadlock in the election of a President and Vice-President.

THE CIVIL WAR AMENDMENTS.

For sixty-one years no further amendments were adopted, although many were proposed. Then came the Civil War, and after its close, the postwar amendments — thirteenth, fourteenth, and fifteenth — embodying the principles for which the victorious northern states had been contending. These three amendments embody, as it were, the terms of peace. They were submitted to the legislatures of the states which had seceded, and acceptance was made an essential of their readmission to the Union. Ratification of the three amendments was virtually imposed upon these states by the triumphant North. The southern states resented this procedure, and they have managed to make one of the postwar amendments, the fifteenth, virtually inoperative.

THE LAST SIX.

Again there was a long interval during which no further amendments were made. Time and again, proposals were made in Congress, but they failed to obtain the necessary two-thirds majority. Meanwhile, however, public sentiment was developing along various lines — in favor of tax reform and the direct election of United States senators, for example. Accordingly, within the short space of twenty years, 1913–1933, six amendments were ratified. Of these, the sixteenth permitted Congress to levy and collect taxes on incomes without apportioning such taxes among the states; the seventeenth provided for the direct election of senators; the eighteenth inaugurated a short-lived experiment in national prohibition; the nineteenth established woman suffrage; the twentieth changed the date of the presidential inauguration and abolished the "lame duck" session of Congress; while the twenty-first amendment repealed the eighteenth.

AMENDMENT AS A LAST RESORT.

The Constitution has not been greatly changed by these twenty-one amendments. Most of them impose restraints rather than add powers or change methods. Constitutional amendments in the United States have been relatively few because there are easier ways of gaining the same end. The election of the President

by what is essentially direct popular suffrage, for example, has been secured by the voluntary individual action of the state legislatures; but if these legislatures had persisted in naming the presidential electors (as the Constitution permits them to do), rather than turning the election over to the people, it is altogether certain that a constitutional amendment would have been utilized to force the change. Amending the Constitution, far from being a first recourse, is a channel of last resort for obtaining what cannot be had by statute, by usage, or by judicial interpretation.

In the general framework of American government, the changes of the past century have been numerous but not fundamental. It is in the practice of government, in the things which the laws, judicial decisions, and usages determine, that most of the changes have taken place. The people of the United States live under a far more powerful and more democratic national government today than in the closing years of the eighteenth century. This is not because there has been a revolution or a series of revolutions. It is because so much development has been possible within the broad terminology which the framers of the Constitution employed; and because the Supreme Court, during most of its history, has shown a friendliness towards the expansion of federal authority.

AMERICAN GOVERNMENT HAS BECOME MORE DEMOCRATIC.

And, after all, the *form* of a government reaches but a little way. It is the *spirit* that giveth life. "Constitute government how you please," Edmund Burke once wrote; "the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of ministers of state. . . . Without them your commonwealth is no better than a scheme on paper, and not a living, active, effective organization." It is allowable to repeat, therefore, that the Constitution of the United States is not a "horse-and-buggy" affair projected into a motorized era, but in almost every line it has been expanded, modified, and brought into articulation with the life of each succeeding age. Among present-day constitutions it is one of the most up-to-date, the most thoroughly modernized. It is easy to pick flaws in this fundamental law of the nation, but what body of men is there nowadays that could be trusted to frame a better one?

FORM VERSUS SPIRIT.

So the government of the United States ought to be studied, not as a static mechanism but as a living organism; not as a moribund heritage from the past but as a going concern. The American Constitution was born in the eighteenth century, grew to vigor during the nineteenth, and in the twentieth it is naturally showing in its visage some wrinkles that have to be smoothed out. Many of the young men and women who are

now in college will live to celebrate its bicentennial in 1987. What kind of a Constitution will it be (if it survives) on its two-hundredth birthday?

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CHAPTER VI

CITIZENSHIP AND CIVIL RIGHTS

The God who gave us life gave us liberty at the same time. — *Thomas Jefferson.*
What rights are his that dare not strike for them? — *Tennyson.*

Citizens are those who possess full membership in a political community. They are differentiated from aliens, who do not have all the rights which go with this full membership. In the United States the citizens outnumber the aliens about thirty times over, and this disparity is steadily widening. Most aliens, after they have lived for a sufficient time in the United States, become naturalized citizens. They thereby acquire certain rights and privileges, such as the privilege of voting, which they would not have if they continued to be aliens.

CITIZENS AND ALIENS.

Who are citizens of the United States and how have they obtained that status? The Constitution in its original form uses the term "citizen" seven times, but nowhere defines the term. Apparently it was assumed that the existing rule of English law would be followed: namely, that allegiance within the jurisdiction would determine citizenship, and hence that all resident persons owing allegiance to the United States would be regarded as citizens. But the Constitution seems to have contemplated two types of citizenship, for it speaks of "citizens of the different states" as well as "citizens of the United States." By doing this, it created confusion and raised some embarrassing questions. Could an individual be a citizen of the United States without being also a citizen of some state in the Union? Or could he have state citizenship without possessing national citizenship?

WHO ARE CITIZENS?

During the years preceding the Civil War, a great deal of controversy arose as to whether there were really two citizenships, or merely two phases of the same citizenship. Some interpreters of the Constitution argued that the two citizenships were separable, and that citizenship of the United States was not a necessary consequence of state citizenship. A state, they maintained, might confer its own citizenship upon individuals without

THE OLD CONTROVERSY OVER DUAL CITIZENSHIP.

thereby giving them the privileges of American citizens. Others contended that the two citizenships were necessarily conjoined. No one, they claimed, could be a citizen of a state without becoming also a citizen of the United States, and vice versa.

After a great deal of discussion in pamphlets and speeches, this issue finally came before the Supreme Court in the Dred Scott Case (1857),

THE DRED SCOTT DECISION.

where the issue turned on the question of whether a state could grant citizenship to a Negro, and if so, whether this made him a citizen of the United States. Under the leadership of Chief Justice Roger B. Taney, the court upheld the dual-citizenship doctrine in these words:

> It does not by any means follow that because he [Dred Scott] has all the rights and privileges of a citizen of a state, he must be a citizen of the United States. He may have all the rights and privileges of a citizen of a state and yet not be entitled to the rights and privileges of a citizen in any other state. For, previous to the adoption of the Constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each state may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them.[1]

This astounding decision left the situation in a hopeless muddle. A state might confer citizenship upon an alien without making him a citizen of the United States. In that case, he would be left without the status of an American citizen in international law; for the individual states were not recognized by foreign countries as having power to confer citizenship. Moreover, since the southern states did not accord citizenship to Negro slaves, this decision placed them in the category of men without any citizenship at all.

There the whole issue remained while the Civil War was being waged. Lincoln's Emancipation Proclamation freed most of the slaves, but did

REVERSED BY THE FOURTEENTH AMENDMENT.

not confer American citizenship upon them. When the war was at an end, however, Congress passed a civil rights act which provided that all persons born in the United States and not subject to any foreign power were to be deemed

[1] Dred Scott *v.* Sandford, 19 Howard 393 (1857).

citizens. This was followed, two years later, by the adoption of the fourteenth amendment, which decreed that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside," thus definitely rejecting the doctrine of separable citizenship which had been enunciated in the Dred Scott decision. Citizenship of the United States was, by this amendment, made primary and fundamental. Since 1868 every citizen of the United States by birth or naturalization has become automatically a citizen of the state in which he resides.[1] And no matter where he resides, the fourteenth amendment provides that his privileges and immunities as a citizen of the United States must not be abridged.

Now the words of this fourteenth amendment may at first glance seem to be perfectly clear, but in reality they are not. For it will be noted that the phrase "subject to the jurisdiction thereof," introduces a limitation. It means that birth in the United States is not absolutely conclusive in establishing American citizenship; one must be born within the jurisdiction as well as within the boundaries of the United States. Thus, children born to parents enjoying extraterritorial privileges, for example, children born to diplomats stationed in the United States, are not American citizens by birth. Foreign legations are deemed to be outside the jurisdiction and are, by a legal fiction, assumed to be part of the foreign country which the diplomat represents. On the other hand, a person may be born outside the jurisdiction and outside the United States — for example, he may be the child of American parents residing abroad. In that case, if one of his parents resided in the United States prior to the child's birth (and the conditions prescribed by the Nationality Act are fulfilled), the child is entitled to have the status of a natural-born citizen of the United States.[2]

CITIZENSHIP BY BIRTH.

Lawyers know that there are two general doctrines upon which citizenship by birth can be based. One is the English legal principle, known as the *jus soli*, which regards place of birth as the controlling factor; the other, known as *jus sanguinis*, is derived from the old Roman law and puts the main emphasis on parentage. The United States recognizes both birthplace and parentage as alternative qualifications. Accordingly, persons born on

Jus soli AND *jus sanguinis*.

[1] Of course, it is possible for one to be a citizen of the United States without being a resident of a state. He may reside in the District of Columbia, for example, or in Hawaii, Alaska, or Puerto Rico.

[2] The laws of nationality were revised and codified by the Nationality Act of October 14, 1940. This Act deals in some detail with cases in which only one parent is a citizen of the United States. See footnote, p. 84. On the general question of citizenship, see Luella Gettys, *The Law of Citizenship in the United States* (Chicago, 1934), and Arnold J. Lien, *Privileges and Immunities of Citizens of the United States* (New York, 1913).

American soil and within the jurisdiction are entitled to claim American citizenship no matter who their parents are; while children of American parentage, residing outside the United States, are entitled to claim American citizenship if certain formalities have been complied with.[1]

THE NATIVE-BORN.

American soil, on which a citizen may be born, includes not only American legations abroad, but American ships of war anywhere (even in foreign ports), though not American merchant vessels even when on the high seas. It includes Alaska, Hawaii, Puerto Rico, and the Virgin Islands, but not the Canal Zone nor the Philippines. It matters not that a child's parents are both aliens; they may even be aliens who are themselves ineligible for naturalization. Thus the American-born child of Japanese parents, residing in the United States, is an American citizen by birth, although his parents are themselves ineligible to become citizens.

CITIZENSHIP BY NATURALIZATION

CITIZENSHIP BY NATURALIZATION.

Citizenship may be acquired not only by birth but by naturalization. Naturalization is a legal procedure by which aliens are transformed into citizens. It may be either collective or individual naturalization. In the former case, whole bodies of people are admitted to citizenship at one stroke, as when new territory is annexed to the United States and the inhabitants of such territory taken within the fold of American citizenship by treaty or by act of Congress. This was done in the case of Texas. Likewise the act of Congress which provided a civil government for Hawaii in 1900 conferred American citizenship on all those who had been citizens of the Hawaiian Republic. On several other occasions, when the United States has acquired new territory by treaty, the inhabitants of these territories have been collectively naturalized.[2] And, by an act of 1924, citizenship was conferred upon all Indians born within the jurisdiction of the United States.

COLLECTIVE NATURALIZATION.

But the mere acquisition of new territory by the United States does not of itself admit the inhabitants to American citizenship. There must be a specific provision by treaty or by action of Congress. The treaty with

[1] If both parents are citizens, one having resided in the United States at some time prior to the birth of the child, the law now imposes no further conditions. But if one parent only is a citizen, he or she must have resided in the United States for ten years, half of that time after reaching the age of sixteen; and the child loses citizenship unless he resides in the United States for five years between the ages of thirteen and twenty-one.

[2] For example, the Louisiana Treaty of 1803; the Florida Treaty of 1819; and the Alaska Treaty of 1867. And in 1927 the inhabitants of the Virgin Islands were collectively admitted to American citizenship by act of Congress.

Spain in 1898, by which the United States acquired Puerto Rico and the Philippines, contained no such provision; on the contrary, it stipulated that the annexation of these islands should not operate to naturalize the Puerto Ricans and Filipinos. In 1917, however, Congress granted full status as citizens to the Puerto Ricans. To the Filipinos it gave some of the privileges and immunities of citizens; but it never made them citizens of the United States. Today they are citizens of the Philippine Commonwealth.

MERE CONQUEST DOES NOT ENTAIL COLLECTIVE NATURALIZATION.

Individual naturalization, as the term implies, is the process of converting aliens into citizens, one by one. The procedure is established by federal statutes, more particularly by the Naturalization Act of 1906, and by the Nationality Act of 1940. While the actual process of individual naturalization is performed by the courts, the preliminaries are supervised by the immigration and naturalization service of the department of justice. This bureau maintains representatives at various centers throughout the country. It is their business to assist applicants for naturalization and to relieve the courts from the necessity of carefully checking all the facts stated in the applications.

INDIVIDUAL NATURALIZATION.

There are three steps in the naturalization procedure, all of which must be taken before a federal district court or a state court of competent jurisdiction. The first step, commonly called "taking out first papers," is a formal declaration of intention to become a citizen. This declaration may be made by any qualified alien: that is, one who, being able to speak the English language, is a white person, or of African nativity or of African descent, or descended from a race indigenous to the Western Hemisphere.[1] Such declaration may not be filed, however, until the alien has reached the age of eighteen years. It must contain information as to the applicant's name, age, parentage, occupation, country of origin, and time and place of arrival in the United States; a statement that he is not an anarchist, or an opponent of organized government, or a member of any group teaching opposition to organized government; and it must further declare his intention to renounce his former allegiance and become an American citizen. A copy of this document, under the seal of the court, is given to the alien, and must be presented by him when he applies for final naturalization. Such is the normal procedure.

STEPS IN NATURALIZATION:

1. THE DECLARATION OF INTENTION.

[1] It will be noted that this wording excludes Chinese, Japanese, Hindus, and in fact nearly all Asiatic aliens. Armenians, however, have been held to be "white persons," and a limited right of naturalization is now extended to Chinese aliens.

But an alien who marries a citizen, or whose alien spouse becomes a citizen by naturalization, may be naturalized without first papers after a residence of three years. The residential requirement is shortened by one year if the two parties have been living in marital union throughout the last year.[1]

2. THE FILING OF A PETITION FOR CITIZENSHIP.

After not less than five years' continuous residence in the United States, and not less than two or more than seven years after an alien has filed his declaration of intention, he may take the second step. This involves the filing of a petition for citizenship. It may be presented in one of the various courts designated by law as having authority over naturalization matters, provided the applicant has lived within the jurisdiction of the court at least one year immediately preceding the filing of his petition. The petition must be signed by the applicant himself, and must give full answers to a set of prescribed questions. If the alien has arrived in the United States since June 29, 1906, his petition must also be accompanied by a document from the United States immigration authorities certifying the time and place of his arrival. In addition he must file with his petition the sworn statements of two witnesses (both citizens of the United States) in personal testimony to his five years' continuous residence and his moral character, as well as in substantiation of the other claims made in his petition. After this paper has been filed with the clerk of the court, it must be kept without action for at least ninety days, during which time a notice of its filing is publicly posted. In this interval an investigation of the petitioner's statements is made by a federal agent.

3. THE GRANTING OF NATURALIZATION OR "FINAL PAPERS."

All these formalities having been attended to, the petitioner awaits the third and final step. The court sets a date for a hearing upon the petition. This hearing must be public, and cannot take place within thirty days preceding any regular federal or state election. The applicant must answer such questions as are put to him by the presiding judge, who may demand proof that the applicant understands and is attached to the principles embodied in the Constitution of the United States. The rigor of this examination depends on the judge. He may, for example, inquire whether the applicant is willing to fight for his new country.[2] He may ask him

[1] Citizenship may likewise be acquired without formal declaration of intention by aliens who have served three years in the United States Army or Navy and who are still so serving or who have been honorably discharged therefrom.

[2] In two cases, which attracted wide attention, the Supreme Court held that admission to citizenship could properly be denied to any applicant who refused to affirm a willingness to serve in the armed forces of the United States if called upon. One of these applicants was a woman. See the decision in United States *v.* Rosika Schwimmer, 279 U. S. 644 (1929). The other was a professor of theology. See the decision in United States *v.* MacIntosh, 283 U. S.

whether he understands what a writ of habeas corpus is, or how presidential electors are chosen, or where the Supreme Court gets its power to declare laws unconstitutional, or what is meant by the right of eminent domain. And when he does, he is likely to get some strange answers.

Nowadays, however, it has become the practice to have examiners from the naturalization service perform this work of inquiring into the applicant's knowledge of American government. Then the judge takes the examiner's word for it. In any event, if the court is satisfied that the applicant is of eligible nativity or descent, has lived continuously for five years in the United States, can speak the English language, is of good moral character, a believer in organized government, understands and is attached to the principles of the Constitution — if the court is satisfied on all these points, the oath of allegiance is administered and the clerk of the court is authorized to issue letters of citizenship, or "final papers" as they are more commonly called.

Quite a long process this is before an alien can say *Civis Americanus sum!* As a matter of fact we expect from naturalized citizens a higher standard of character, literacy, and willingness to fight than we exact from those who happen to have been born within the United States. Not all native-born Americans can produce credentials certifying to their moral integrity, their knowledge of the nation's government, and their willingness to defend the Constitution, right or wrong. The long roll of red tape which encircles our naturalization procedure represents an attempt to get rid of various abuses which existed under the earlier naturalization laws. In those good old days great crowds of aliens were often herded into the courtroom by politicians during the days immediately preceding an election and given the oath of allegiance en masse. Paid witnesses were provided by these politicians to vouch for aliens whom they had never seen. The naturalization of newly arrived foreigners and the speedy placing of their names on the voters' list became regular activities of the ward bosses in every large city.

REASONS FOR THE STRICTNESS OF THE PRESENT NATURALIZATION LAWS.

These abuses have now been eliminated, but at the expense of making the new procedure tedious and complicated. Moreover, the present method still leaves some leeway for political favoritism. The judge (or the official examiner) can make the examination of an alien easy or difficult. He can ask a few perfunctory

THE GRADUAL ELIMINATION OF ABUSES.

605 (1931). In rendering these decisions the court had no discretion other than to apply the naturalization law, which does not provide for any reservations to the oath of allegiance, but requires every applicant to swear that he will "support and defend the constitution . . . against all enemies, foreign and domestic."

questions about the American ideology of government, or he can give an oral examination that would flunk a college graduate. He can make sure that the applicant actually speaks and understands the English language (which is what the law requires), or he can be satisfied with a nod of the head in answer to his questions. And of course any alien can nod his head in English. While individual naturalization is supposed to involve the admission of aliens one by one, it is still the occasional practice to put them through in batches when the court finds itself too busy to do otherwise. This is not surprising when one bears in mind that more than one hundred thousand aliens are naturalized each year.

CITIZENSHIP OF WIVES AND CHILDREN.

It is a rule generally recognized among nations that the naturalization of a father carries with it the naturalization of all his legitimate children under twenty-one years of age, provided they are resident in the country with him. Likewise, the naturalization of a husband makes his wife a citizen. This latter rule was followed in the United States until after the close of the First World War. An alien woman (if herself eligible for naturalization) became an American citizen if she married one, and conversely an American woman lost her citizenship if she married an alien. This, of course, was a simple and easy arrangement, but during America's participation in the war it led to many embarrassments. American-born women who had married Germans suddenly found themselves rated as alien enemies in the United States, while German-born women who had married American citizens found themselves similarly treated in Germany.

THE CABLE ACT (1922) AND AMENDMENTS.

By a series of legal enactments, therefore, Congress abrogated the old rule, so that marriage no longer operates either to give citizenship or take it away. A woman of foreign citizenship who marries an American does not now become an American citizen thereby. She can become a citizen only by naturalization; but in her case a shorter period of residence is required and the formal declaration of intention is not needed. On the other hand, an American woman who marries a foreigner does not lose her American citizenship, although she may formally renounce it and assume her husband's citizenship if she so desires. Moreover, if an alien woman residing in the United States (being herself eligible for naturalization) marries another alien who, although eligible for naturalization, does not choose to take advantage of his opportunity, the alien wife may go ahead and be naturalized without him.

These changes were intended to "recognize the right of women to their own individuality." They made the two sexes equal as regards the

acquisition and loss of citizenship. The intent was commendable, but the workings of the new system have not been altogether satisfactory. Some confusion has resulted, because other countries hold to the old rule. The American citizen who marries an alien woman gets a wife who has no citizenship at all, for her own country disclaims her and the United States does not accept her. On the other hand, the American woman who marries an alien becomes invested with two citizenships, for both her own and her husband's country claim her. When a husband and wife travel together with passports which have been issued by two different nations, it is not surprising that immigration officers in foreign countries raise their eyebrows.

THE RESULTING CONFUSION.

There is a Latin maxim: *Nemo potest exuere patriam* — no one can give up his native citizenship. There are some countries which still hold to that rule (or try to), but it has long been abandoned by the United States. American citizenship can be given up by becoming naturalized in some other country, or even by taking the oath of allegiance to some other country.[1] It is also presumed to be lost if a naturalized citizen resides for three years continuously in the country of his origin, or for five years in any other foreign country. There is a common belief that persons lose their citizenship when convicted of serious crimes and sent to prison. But what they lose is not their citizenship but their civil and political privileges, including their right to vote.[2]

HOW CITIZENSHIP MAY BE LOST.

Are corporations citizens? Not literally so, but for most judicial purposes they are. A corporation is deemed to be a citizen of the country or the state in which it is chartered. The legal doctrine may be briefly stated as follows: The citizenship of a corporation is determined by that of the persons composing it; but when the corporation receives its charter from a state, the presumption is that its members are citizens of that state, and this presumption may not be rebutted by any evidence to the contrary. No matter where its stockholders reside, therefore, a corporation chartered in New Jersey is by

IS A CORPORATION A CITIZEN?

[1] Enlistment in a foreign army customarily involves taking such an oath and forfeits citizenship. But in 1917 Congress passed an act providing that American citizens who enlisted in the armies of the Allied Powers could regain their citizenship by taking the oath of allegiance to the United States. In the Second World War, before the United States entered it, many Americans enlisted in the armed forces of Canada, which permitted them to do so without exacting an oath of allegiance. By diplomatic agreement, in 1942, such men were repatriated and Canadian residents of the United States exempted from the draft if, in each case, they preferred to serve their own country. At the same time Congress provided, after the manner of the act of 1917, for cases in which citizenship may have been lost through taking an oath of allegiance to one of the United Nations.

[2] See Everett S. Brown, "The Restoration of Civil and Political Rights by Presidential Pardon," *American Political Science Review*, Vol. XXXIV (1940), pp. 295–300.

legal fiction deemed to be a citizen of that state and as such is entitled to the equal protection of the laws in all other states.

This principle becomes important in determining whether a suit to which a corporation is a party can be brought in the federal courts as a suit "between citizens of different states." Corporations chartered in different states come within the scope of this provision. But while regarded by the courts as having a judicial status of citizenship, a corporation is not a citizen in the full sense of the term, and is not entitled to all the "privileges and immunities" which the Constitution guarantees to individual citizens. It is quite permissible in the laws of any state to make reasonable discriminations between corporations chartered there and those chartered elsewhere, and to give to the former some privileges which are denied to the latter.

SUITS BETWEEN AMERICAN CORPORATIONS OF DIVERSE STATE CITIZENSHIP.

American citizens by birth and by naturalization are on a plane of complete legal equality save in two respects. A naturalized citizen cannot become President or Vice-President of the United States. And a naturalized citizen is not entitled to American protection against public duties (such as military service) which may be claimed from him by the country of his former allegiance if he goes back to that country. But he will be protected against such claims so long as he stays in the United States. Even aliens in the several states of the Union are entitled to the "equal protection of the laws." Apart from the right to hold office and to vote, to practice certain professions, and in some states to be employed by any public authority, the legal status of an alien in the United States does not differ appreciably from that of the citizen. He is taxed like a citizen; he may sue and be sued in the courts; may own property,[1] practice any legal trade, send his children to the public schools, and be generally protected in all the fundamental rights. So long as he behaves himself he is not reminded of his alien status — except on election day or when he tries to get a job on the public pay roll.

THE EQUALITY OF ALL CITIZENSHIP, HOWSOEVER DERIVED.

CIVIL RIGHTS

What are the "constitutional rights" of the American citizen? We hear much about these rights — sometimes from people who have strange notions as to what they are. Thus one hears of the citizen's right to personal liberty, to freedom from arrest without warrant, freedom of speech, freedom to march in a pro-

THE CITIZEN'S CONSTITUTIONAL RIGHTS.

[1] In some states those aliens who are ineligible to citizenship cannot own or lease land, e.g., in California.

cession with provocative banners, and so forth. As a matter of fact, nothing is much more difficult to make than a list of the American citizen's constitutional rights as they have been interpreted by the courts. It would take a whole volume to name them, with all their limitations.

The national Constitution, including its amendments, enumerates a considerable number of rights which must not be denied, impaired, or abridged; but this enumeration is not intended to be complete. On the contrary, it is expressly declared that the mention of certain rights shall not be construed to deny or disparage others.[1] The various state constitutions are also prolific in their assertion of civil rights, and here again the list is not intended to be all-inclusive. To make the confusion worse, both the federal and state courts have been strict in their interpretation of some rights and liberal in construing others. So we have nowhere a complete statement of just what constitutional rights an American citizen possesses or does not possess. And if such a list were compiled today it would be inaccurate tomorrow, for the courts are continually changing their rulings in this field. As the Supreme Court said on one occasion, the scope of these rights must be fixed by "a gradual process of judicial inclusion and exclusion."[2] It is difficult to catalogue a gradual process.

But it may be said without hesitation that many things which the average citizen claims as his constitutional rights are not rights at all. The right to vote, for example, is not a right guaranteed by the federal Constitution. The highest court in the land has made it clear that "the Constitution of the United States does not confer the right of suffrage on anyone."[3] What the federal Constitution does is purely negative: namely, to decree that the suffrage shall not be denied to anyone on certain grounds — viz., race, color, previous condition of servitude, or sex. But it may be denied for lack of age, residence, literacy, or even property. Voting is a right which a citizen obtains by showing himself possessed of the qualifications which have been established by the state in which he resides.

SUFFRAGE IS NOT ONE OF THEM.

There is no constitutional right, moreover, to hold public office, to serve on a jury, to get married, to practice law, to keep a drugstore, to attend a state university, to drive a motor car on the public highways, or to do various other things which people often say they have a "right" to do. The laws give them these privileges, withhold them, or grant them under such various restrictions as the public interest may seem to require. All this is not mere shadow-

NOR IS OFFICE-HOLDING.

[1] Ninth amendment.
[2] The Slaughterhouse Cases, 16 Wallace, 36 (1872).
[3] Minor *v.* Happersett, 21 Wallace 162 (1874).

boxing with words, for between a constitutional right and a privilege conferred by law there is a fundamental difference. In the common speech the distinction is usually disregarded; but students of government should get into the habit of using these terms in their proper sense, for loose terminology and cloudy thinking are comrades always.

THE INALIENABLE RIGHTS SECURED: I. BY THE NATIONAL CONSTITUTION.

The rights of the American citizen are formulated, first of all, in a series of limitations on the power of Congress, some of which are contained in the original Constitution and some in the articles of amendment, particularly in the first ten amendments which, taken together, are commonly called the bill of rights. These rights, as there stated, include (1) the right to be immune from punishment by any bill of attainder or ex post facto law, (2) to have the privilege of the writ of habeas corpus except when the public safety may require its suspension, (3) to enjoy freedom of worship, freedom of speech, freedom of the press, freedom to assemble peaceably, and freedom to petition the government for the redress of grievances.

They include likewise (4) the right to keep and bear arms when so authorized by the militia laws of any state, (5) to have no soldiers billeted on them except in time of war[1] and then only in a manner prescribed by law, (6) to be secure in person and in home against unreasonable searches and seizures, and from the issue of search warrants without probable cause supported by oath, (7) to be given in the federal courts all manner of judicial protection, including security against trial for any serious crime except upon action of a grand jury, and (8) assurance against being twice placed in jeopardy for the same offense, (9) in criminal cases to be assured a speedy and public trial by jury, (10) to be informed of charges, (11) to be confronted with witnesses, (12) to have the assistance of counsel, (13) to have jury trial also in important civil cases, (14) to be free from the requirement of excessive bail, and (15) not to be subjected to any cruel or unusual punishment.

Also they comprise (16) the right to be free from bondage or involuntary servitude save as a punishment for crime, (17) the right to be protected in life, liberty, and property unless deprived thereof by due process of law, and (18) to receive in every state of the Union the equal protection of the laws.[2] In addition, every citizen has (19) the right to pass freely from state to state, (20) to acquire a residence in any state

[1] General Theodore Roosevelt, in writing of his experiences as a billeting officer in France during the First World War says, "I knew nothing about billeting except that it was forbidden by the Constitution of the United States." *Average Americans* (New York, 1920). He should have added "except in time of war," — which is a highly important exception.

[2] For an explanation of "due process of law" and its history see Chapter XXXII.

and to be accorded the same privileges as those citizens who are already resident there, and (21) to sue and be sued in the courts. Finally, there is the assurance (22) that private property will not be taken except for public use and then only with just compensation; and (23) a republican form of government is guaranteed to every state in the Union.[1]

THE FOREGOING LIST IS NOT COMPLETE.

This list of rights guaranteed by the Constitution of the United States does not form a complete catalogue of civic rights, but only of the fundamental ones. Nor do most of them appertain to citizens alone, but extend to all persons within the jurisdiction. This fact should be strongly emphasized, because it is too frequently overlooked. All constitutional rights are at the same time constitutional limitations, that is, limitations upon the power of the public authorities to interfere with the rights of the individual. The Constitution does not say that people shall have freedom of speech; but it achieves the same end by stipulating that "Congress shall make no law . . . abridging the freedom of speech." A significant feature of the Constitution is that while it contains only twenty grants of power or thereabouts, it sets forth at least thirty specific prohibitions, restrictions, and limitations. Well might Washington write to Lafayette, as he did in 1788, that this document was "provided with more checks and barriers against the introduction of tyranny . . . than any government hitherto instituted among mortals hath possessed." The exact scope of these checks and barriers against tyranny will be the theme of a later chapter.[2]

2. BY THE STATE CONSTITUTIONS.

For the most part, the guarantees in the national Constitution protect the individual's rights against the federal government only. The provision for trial by jury, for example, applies only to the federal courts. But virtually all the state constitutions also guarantee trial by jury, so that the jury system is established in the state courts as well. It is a point worth emphasizing, moreover, that no right conferred by either the national or state constitutions is unlimited. The right of free speech does not imply the liberty of every citizen to say what he pleases, regardless of its truth or falsity. The right to freedom of worship does not entitle the members of any religious cult to contract polygamous marriages, under the guise of practicing the tenets of their faith. The right to freedom of the press gives no license to print libels. As the Supreme Court once said in quite another connection: "The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither

[1] These various rights are discussed under the appropriate headings in later chapters.
[2] See Chapter XXXII.

definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance." [1]

THE ABUSE OF RIGHTS.

Unhappily, we hear more about the rights of the citizen than about his duties. The crook and the chiseler, when haled into court, demand all their rights under a Constitution which they have had no scruples about violating. The rabble-rouser who brands the Constitution as an obstacle to human freedom, and calls for its overthrow by violence if need be, is nevertheless the very first to demand a writ of habeas corpus, a trial by jury, and the equal protection of the laws which this document guarantees. Even traitors and spies, the agents of totalitarian tyrants, have not hesitated to seek, when brought to book, all the protection that the Constitution provides in the way of barriers to tyranny.

RIGHTS AND DUTIES.

Of course every right, of whatever sort, carries an obligation along with it. The right to the equal protection of the laws carries with it, as on the reverse of a shield, the obligation to obey these laws. The right to vote (if you insist on calling it a right) involves the duty to vote. The right to claim protection against foreign enemies carries with it the duty of helping to build up a government that will be able to give this protection. The right to sue in the courts carries with it the obligation to abide by their decisions. The right to share in the making of laws is conjoined with the duty of co-operating in the observance of these laws. It is a poor sort of citizenship that claims the rights and avoids the obligations. "The primal duties" of citizenship, as Wordsworth says, should "shine aloft, like stars."

WHY DUTIES NEED EMPHASIS.

What, then, are the primal duties of the citizen? They are not set forth in the Constitution, it is true, but they are implied in the very nature of free government. The citizens of a democracy who act upon the assumption that popular government imposes no duties will in time have no rights worthy of the name. Popular government implies not only government for the people but by the people. To a far greater extent than any other form of government it makes demands in the way of self-sacrifice, public spirit, intelligence, and watchfulness. "Our forefathers," declaimed Pericles, "have long possessed this land and by their valor they made it free." But the forefathers of a people cannot *keep* a country free. Their descendants must do that, if it is to be done, by being willing to give as well as take.

The Constitution of the United States, for example, guarantees to every citizen that he shall have the privilege of living under a "republican form of government." But this guarantee will mean much or little as

[1] Adkins *v.* Children's Hospital, 261 U. S. 525 (1923).

each living generation chooses to make it. A government may be republican in form and yet be very bad government — inefficient, oppressive, and corrupt. All the governments of Central and South America are republican in form; yet some of them are nothing but guerilla dictatorships with military juntas able to seize power at an hour's notice. Dictatorships in Germany, Russia, France, and elsewhere have masqueraded in the garb of republicanism. To say that a government is republican in form, or even democratic in form, means nothing. European and Asiatic dictatorships claim to be the most "popular" governments ever devised, with a solicitude for the people's welfare never matched in all the ages. Yet not a single one of the civic rights guaranteed by the Constitution to the people of the United States has been tolerated by these dictatorships.

PROPER PERFORMANCE OF CIVIC DUTIES IS ESSENTIAL TO GOOD GOVERNMENT.

Every American citizen, Gentile or Jew, ought to read and ponder the parable of Jotham in the Old Testament. It is the oldest, and one of the best parables in the literature of democracy. "The trees went forth on a time to anoint a king over them; and they said unto the olive tree, Reign thou over us." But the olive tree replied, as many a professedly good citizen has done when asked to do some public service: "Should I leave my fatness wherewith by me they honour God and man and go to be promoted over the rest of you?" So they repaired to their second choice, the fig tree. "But the fig tree said unto them, Should I forsake my sweetness, and my good fruit, and go to be promoted over the trees?" And to the vine they went, with the same result. Presently, however, they came to the bramblebush with their invitation to rulership. And the bramblebush, true to type like a modern politician, was more than willing to serve. Said the bramblebush: "If in truth ye anoint me king over you, then come and put your trust in my shadow; and if not, let fire come out of the bramble, and devour the cedars of Lebanon." [1]

A PARABLE AND ITS LESSON.

When the olives, the fig trees, and the vines in the arboretum of a nation's citizenship disdain to fulfill their civic obligations, the bramblebushes of politics will step in and give any country, or any community, the kind of government it deserves. The excellences of a constitution avail little if the actual machinery of government be not based upon a sound sense of individual duty. The world has never yet been able to maintain a successful democracy on foundations of public indifference and complacency.

[1] Judges, ix: 8–15.

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CHAPTER VII

THE PRIVILEGE OF VOTING

> Nature does not bestow virtue;
> We are born for it, but without it.
> — *Cicero.*

"Democracy," said Herodotus, "is a form of government in which the people rule." This is one of the earliest, the simplest, and the least informative among all definitions of democracy ever framed. For even dictatorships claim to be governments in which the people rule. They profess to be governments by popular consent, and outwardly they are. But consent which allows no alternative is no consent at all. It used to be taken for granted that universal suffrage, if established and maintained, would guarantee a democratic system of government. But we have learned, somewhat late in the history of political science, that dictatorships are sometimes the ones that have the widest suffrage. The qualifications for voting in Russia, as set forth in the constitution of that country, are the most liberal of any country in the world.

THE TEST OF DEMOCRACY.

All this means that true democracy requires something more than letting everybody vote. It is indeed quite compatible with a limited electorate, provided those who have the right to vote are allowed to register their real judgment at the polls, without intimidation by the public authorities and with a free choice between alternatives. In some countries the whole adult population has gone to the polls on election day, amid the ringing of bells and the blaring of bands; but only to approve the policies and the candidates of the party that was already in power. Universal suffrage, under such conditions does not mean much.

So, while the size of the electorate may be of importance, it is not the principal thing. The American system of government does not rest on universal suffrage alone, but on free suffrage, on the free exercise of the privilege of voting by those who have it. And who are those who have it? People sometimes use the terms *citizen* and *voter* as though they meant the same thing, but not all

CITIZENS AND VOTERS.

citizens are voters. There are millions of young American citizens in forty-seven states of the Union who do not qualify as voters because they are not yet twenty-one years of age. The voters comprise that portion of the citizenry which has been given the privilege of voting. And this proportion has been steadily widened during the past hundred and fifty years until today it includes virtually all adult citizens of both sexes.

WHY THE AMERICAN SUFFRAGE IS NOT UNIFORM.

Yet neither in law nor in fact is there any necessary connection between citizenship and voting. Citizenship is a federal matter. The federal government determines, under the Constitution, who shall be rated as citizens, whether by birth or by naturalization. But the federal government does not give voting privileges to anyone. It makes citizens, not voters. The states determine who shall vote, even at national elections. It is true, of course, that the states are not free to make any rules they please on this point; they are forbidden to deny the suffrage on certain grounds (namely, race, color, previous condition of servitude, or sex), and they must also (for congressional elections) establish the same suffrage requirements that exist for elections to the larger branch of their own state legislatures. But even with these restrictions they have a good deal of discretion left them. They may allow aliens to vote; and before the First World War, at one time or another, seventeen states did so. It was not until 1926 that the last of these (Arkansas) abolished alien voting.

THE STATES CONTROL THE SUFFRAGE.

The states determine, moreover, the residence requirements for voting, the taxpaying requirements, and the educational qualifications if there are any. Within the constitutional limits they may set up any requirements they please. They could, if they so desired, provide that no one may vote at a presidential or congressional election unless he is able to recite the Declaration of Independence, or sing the high notes in the Star-Spangled Banner, or go through the manual of arms. No state has done anything of the sort, of course, or is likely to do so; but all of them have set up various specific requirements for voting — such as a period of residence in the state, sometimes the payment of a poll tax, ability to read and write, or even the capacity to pass a mild intelligence test. That is why the requirements for voting at presidential elections are not uniform throughout the United States. A citizen may be a voter at the presidential election in Pennsylvania, when, under exactly the same conditions, he would not be permitted to vote at a similar election in New York.

In the thirteen colonies before the American Revolution the privilege of voting was generally restricted to male property owners and taxpayers. Sometimes religious qualifications were added. The Declaration of

Independence proclaimed the equality of men; but the newly independent states did not carry this preachment into effect by giving voting rights to all of them. They kept their several requirements for voting. This situation created embarrassment in the constitutional convention of 1787 when it discussed the question as to who should vote at congressional elections. Some wanted the national suffrage confined to owners of land; some favored extending it to all taxpayers, whether they owned land or not.

SUFFRAGE IN COLONIAL DAYS.

Hardly anyone, among the framers of the Constitution, favored manhood suffrage although Benjamin Franklin, ever liberal in spirit, wanted it made certain that "the common people" would have votes. Then someone raised the question: Why not let each state settle the matter for itself? Let those who are given the right to vote in each state automatically become voters at congressional elections. This seemed to be an easy solution, and it was adopted without a dissenting voice.

THE DECISION IN 1787.

With the matter thus left to the various states, the drift to a liberal suffrage began at once; but for a time the opposition was strong and the progress slow. The anti-suffragists of those days put up a stiff fight against the "vulgarization of politics," as they called it, and even so able a jurist as Chancellor Kent predicted that "the extension of voting rights to all white men on equal terms would end in the ruin of government and in universal calamity." But the movement for a widened suffrage kept gaining impetus, and by 1820 most of the states had abolished their property qualifications.

A GRADUAL EXTENSION AFTER 1787.

Then the new spirit of frontier democracy, as prefigured by Andrew Jackson, surged out of the West. On the frontier a man is a man if he can survive the struggle for existence. And he is as good as any other man. For this reason the new western states insisted on giving every man a vote, and every voter a right to hold office. Some of them went even farther and extended the suffrage to aliens as well as to citizens. This equalizing movement, moreover, did not confine itself to the new West. It backwashed across the Alleghenies to the older states and had its influence there. In one state after another, North and South, the suffrage was liberalized by the abolition of property qualifications, tax requirements, and religious tests. By the close of Jackson's second term, in 1837, manhood suffrage had been adopted by all the states except four with property and six with taxpaying qualifications; and these joined the procession later.

THE SPREAD OF MANHOOD SUFFRAGE.

Consent of the governed and universal suffrage now have become so closely associated in the American public mind that we wonder how

men who were filled with the Spirit of 1776 could withhold the ballot from three quarters of the adult population and yet believe that their government was soundly based upon the voice of the people. But such was the case. At the presidential election of 1832, half a century after the Declaration, less than a million and a quarter votes were polled in a population of more than twelve and a half millions — or about 10 per cent. At the election of 1932, a century later, the polled vote was nearly 30 per cent of the population.

THE SUFFRAGE IN 1832 AND 1932 COMPARED.

Manhood suffrage, as most of the states understood it in early days, did not include the Negro. Except in a few New England states, colored citizens were everywhere excluded from voting. Nor was there any general demand for an extension of the suffrage to the Negro until after the Civil War. Then arose the question whether voting rights should be guaranteed to the new freedmen. Congress, by the Reconstruction Act of 1867, imposed Negro suffrage upon the states of the former Confederacy; and three years later the fifteenth amendment forbade the denial of voting rights to any citizen, by any state, on grounds of "race, color, or previous condition of servitude."

THE NEGRO SUFFRAGE PROBLEM.

THE FIFTEENTH AMENDMENT.

To enact such a prohibition proved easier than to enforce it. For a time, the national government applied coercion to the southern states; but this policy proved effective only so long as federal troops were on hand to make it so. Since 1877, when the troops were withdrawn, the southern states have successfully managed to evade or circumvent the provisions of the fifteenth amendment. At first they did it by Ku-Klux methods, intimidating the Negro into staying away from the polls. But presently there developed a feeling that these rough-handed methods could not go on forever, and that the disfranchisement of the Negro ought to be "legalized." The artifices which have been used for this purpose ought to be explained, if only to show how legal provisions can be set at naught when there is an overwhelming public sentiment in favor of doing so.

IT HAS NOT BEEN EFFECTIVE.

Now it will be observed that the fifteenth amendment does not forbid the denial of voting rights to illiterate persons. And a literacy test would shut out the great majority of colored citizens in the rural areas of the South. But the southern states also contain many white persons who are unable to read and write; hence the problem is one of keeping the illiterate Negro out while letting his illiterate white neighbor in. The attempt was made to solve it by providing that every voter must be able to read a paragraph from the

METHODS OF EVADING IT.

state constitution, or, as an alternative "give a reasonable interpretation thereof." This was on the assumption that any white voter, however illiterate, could expound the constitution to the satisfaction of the registrars, they being of his own color. On the other hand, the illiterate colored man who would set out to give these white officials a "reasonable interpretation" of habeas corpus, due process of law, attainders of treason, second jeopardy, eminent domain, excess condemnation, and what not — well, the result can be left to the imagination of anyone who knows the Southland.

When the Supreme Court of the United States was asked to decide whether this provision constituted a breach of the fifteenth amendment, the decision was that it did not "deny or abridge the right of any citizen to vote on account of race, color, or previous condition of servitude."[1] Legality was thus conferred upon the "reasonable interpretation" procedure despite its sinister purpose; but in due course it was found to have some defects from the politician's point of view. No matter how leniently it was administered, the provision kept many illiterate whites off the voters' list, for there were some who proved unable to give a reasonable interpretation of anything to anybody. So the resourceful solons of Dixie turned to that handy refuge of many a shiftless man — his honest ancestors. They provided that any illiterate man, otherwise qualified, might be registered as a voter within a limited period if he or a lineal ancestor had possessed the right to vote on or before January 1, 1867,[2] or (in Alabama, Georgia, and Virginia) had served in the armed forces of the United States or the Confederate States. This alternative, which was intended to let in every white citizen, but keep out every colored one, came to be known throughout the country as "the grandfather clause."[3]

UPHELD BY THE SUPREME COURT.

But the grandfather clause proved a little too raw for the gowned gentlemen who sit on the supreme bench at Washington. When the issue came before them from the border states of Oklahoma and Maryland, they ruled the grandfather clause to be an evasion of the fifteenth amendment and hence unconstitutional.[4] "It is true," said the court in this decision, "that it [the grandfather clause] contains no express words of an exclusion, from the stand-

DECLARED UNCONSTITUTIONAL.

[1] Williams *v.* Mississippi, 170 U. S. 213 (1898).

[2] This was the date of the earliest act of Congress granting suffrage to the Negroes in the southern states.

[3] It would be more accurate to use the term "permanent-registration clause"; for among the six states of the Solid South resorting to the practice, the "grandfather" provision was omitted in South Carolina and combined with other qualifications in Alabama and Virginia.

[4] Guinn *v.* United States, 238 U. S. 347 (1915), and Myers *v.* Anderson, 238 U. S. 368 (1915).

ard which it establishes, of any person on account of race, color, or previous condition of servitude . . .; but the standard itself inherently brings that condition into existence." Before this decision was rendered, however, all grandfather clauses in the Solid South had expired by limitation. While they were still in vigor a good many illiterate white citizens had been placed permanently on the voting lists. What is, then, the significance of the decisions? It will prevent any revival of the old procedure for the enrollment of a new generation of illiterate white voters.

Some southern states gain their purpose by establishing rigid requirements as to residence and by making the payment of a poll tax essential. In three states, residence of two years in the state and a year in the county is insisted upon. This helps to eliminate the migratory element among colored workers. Negroes in large numbers neglect to pay the poll tax, especially when white tax collectors put no pressure on them, even to the extent of sending a notice. Those who do pay it often lose or mislay the tax receipt, which must be produced at election time.[1] Mention should also be made of the fact that in some southern states it is provided by law that disfranchisement may be ordered on conviction for such misdemeanors as petty theft, vagrancy, or trespass. These so-called "chicken and watermelon laws" accomplish at least a part of their purpose.

POLL TAX QUALIFICATIONS.

Finally, there is a way of permitting Negroes to be registered as voters, but nevertheless depriving them of any real share in the selection of public officials. This is made possible by the system of party organization. Practically all the southern states are overwhelmingly Democratic. The candidates who receive the nomination at the primary elections of that political party are certain to win at the polls; hence the real fight is for the nomination. So Texas in 1923 adopted the expedient of providing that no Negro should be qualified to participate in a Democratic primary and that any ballot cast by a Negro at such primary should be thrown out. But here again the Supreme Court intervened and held this provision unconstitutional as denying to Negroes "the equal protection of the laws." [2] Thereupon the Texas legislature tried to circumvent the decision by providing that the state executive committee of each political party should "prescribe the qualifications of the party's own members," and thus to control eligibility to vote at the primaries. Then the Supreme Court again intervened to enforce "the equal protection" clause of the

EXCLUSION OF NEGROES FROM THE PRIMARIES.

[1] Attempts have been made in Congress to secure the abolition of poll taxes as a requirement for voting, but thus far they have not been successful.

[2] Nixon *v.* Herndon, 273 U. S. 536 (1927).

Constitution.[1] But this was not the end of the matter; for the decision in this case intimated that a political party might, on its own initiative and undirected by state law, prescribe qualifications for membership in the party and hence for voting at the party primary. Thereupon the Democratic state conventions adopted a rule excluding Negroes, and in a unanimous decision the Supreme Court held this action to be constitutional. Nevertheless, in a more recent decision, the Supreme Court virtually reversed itself, holding that Negroes are entitled, under the fifteenth amendment, to participate in primaries, and that a state cannot nullify this right by electoral laws which permit a private organization to discriminate against them.[2]

OTHER METHODS OF KEEPING NEGROES FROM THE POLLS.

Moreover, if worst comes to worst, the colored citizen can be registered as a voter at both primaries and elections, but actually debarred from appearing at either. He can be required to prove that he was never convicted of any offense; he can be bullied by the polling officials; or he can be warned in advance to keep away — and he will usually do it. The number of Negroes who actually vote in the southern states has been relatively small although recently, especially in urban areas, that number has been increasing. There is evidence, moreover, of greater interest on the part of southern Negro organizations in the voting status of their race. Given time and mutual understanding, this whole controversy may iron itself out. Most people agree that the victorious northern states erred after the Civil War in insisting on immediate political equality for the two races, thereby creating in the South a situation that was bound to prove difficult. Seventy-five years after the event it seems clear that emotion rather than cool judgment ruled the mind of the nation when it adopted the fifteenth amendment.

EFFECT ON THE BASIS OF REPRESENTATION.

The framers of the fourteenth amendment foresaw that the white population of the South might attempt to exclude colored citizens from voting, and they provided Congress with a possible method of penalizing any state that should do this. Here is the provision:

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be

[1] Nixon *v.* Condon, 286 U. S. 73 (1932).
[2] Smith *v.* Allwright, 321 U. S. 649 (1944).

reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

The stipulation, be it noted, is that the basis of representation "shall be reduced," but it never has been. Congress alone has power to enact the reduction, and Congress has never been ready to do it, although measures in that direction have been brought in from time to time. Southern congressmen have argued (and if you read the above provision carefully you may agree with them) that if the basis of representation is reduced by reason of Negro exclusion in the South, it should also be reduced in those northern states which exclude thousands of citizens from voting because they cannot read and write, or because they cannot pass an elementary intelligence test — as in New York State. At any rate, there is little likelihood that Congress will reduce the quota of representation from either section of the country.

HAS NOT BEEN MADE OPERATIVE.

It is significant that, of the nine amendments which have been added to the Constitution of the United States during the past hundred years, three deal with suffrage (the fourteenth, fifteenth, and nineteenth), all of them by way of prohibiting its denial on specified grounds. The nineteenth amendment, which became effective in 1920, resulted from an agitation which had been carried on with varying degrees of vigor for nearly three quarters of a century. The right of women to the ballot is sometimes said to be a natural right, and deducible from the fundamental principles of American government. If so, it took the American people a very long time to recognize the fundamental principle in this case. As a matter of fact, they looked upon the issue as one of expediency, not of principle. They were reluctant to double the electorate until they could be convinced that some good would come of it.

THE ISSUE OF WOMAN SUFFRAGE.

The agitation for woman suffrage began in the first half of the nineteenth century, but before the Civil War it made no headway, for people could not be brought to take it seriously. The agitation for "woman's rights" merely furnished the theme of perennial jokes, cartoons, and humorous ditties. But after the Civil War the movement began to make some progress. Manhood suffrage had been won; the Negroes had been technically enfranchised; these older issues were out of the way. The arena was clear for a new suffrage battle; and it was soon in progress. In 1869 the advocates of votes for women won their first skirmish in the territory of Wyoming, when women were given the suffrage at territorial elections; and the privilege was continued when the territory became a state in 1890. During the next ten years Colorado, Idaho, and Utah were also

BEGINNINGS AND PROGRESS OF THE MOVEMENT.

chalked up as states which enfranchised women on the same terms as men. Other states did likewise, one by one, during the next two decades, until in 1915 there were about a dozen of them in all.

THE NINETEENTH AMENDMENT.

But the leaders of the movement lost patience with the slow process of winning the states one by one. They wanted nation-wide enfranchisement and wanted it quickly. So they turned their energy to a constitutional amendment which had been slumbering for many years in the files at Washington.[1] Congress responded to their pressure in 1919, passed the proposed amendment by a two-thirds vote in both Houses, and sent it to the states for ratification. The necessary three fourths of the states accepted it as the nineteenth amendment in a little more than a year, thus putting it into effect for the national election of 1920.

RESULTS OF WOMAN SUFFRAGE.

This is hardly the place to recapitulate the arguments for and against woman suffrage, which were poured into the ears of the American people for a half century or more. The issue is now settled — probably settled for good, and doubtless settled rightly. We have now had more than twenty-five years of nation-wide sex equality at the polls, but what the result has been there is no way of determining, for the ballots cast by men and women are not kept separate. From the superficial indications, however, there is no reason to believe that the extension of the suffrage to women has made any substantial change in the quality of the electorate, whether for good or ill. It has doubled the voting lists throughout the country, thus making the registration of the voters and the holding of elections more expensive. Candidates now have to reach twice as many voters with their propaganda and incidentally do it with less vulgarity than in the old days.

WOMEN VOTE AS MEN DO.

On the other hand, the nineteenth amendment has made twice as many people contented with their electoral status, and has removed an irrelevant issue from American politics. Sex has no more right to be an issue in politics than has race, or color, or religion. The extension of the suffrage to women has undoubtedly developed among them a more vital interest in public affairs. They are using the ballot as men have used it — with about as much intelligence or lack of it. They appear to be susceptible to the same influences, good and bad. Like their husbands and brothers, some women vote regularly and with discrimination, while others go shopping on election day or vote for the hillbilly candidate who talks humbug over the radio. Some women voters are unbossed in their own homes but thoroughly bossed by a ward leader, or perhaps by a clergyman who finds

[1] Known as the Susan B. Anthony amendment. It was first proposed in 1878.

political parables in his gospel texts. In a word, some are wise serpents and some are harmless doves, even as male voters have always been.

Most of the predictions which were made concerning woman suffrage thirty years ago have turned out to be false. It is often so in politics, where predictions are usually the by-products of wishful thinking. Far from supporting candidates of their own sex, women have generally preferred to vote for men. Women voters during the past couple of decades have not, as far as one can discern, altered the party predominance in any of the strongly partisan states. On the whole, they have attached themselves to the established political loyalties. The consensus of opinion is that their enfranchisement has not altered the relative strength of the major political parties in any region of the country.

Controversies as to who shall have the privilege of voting are not yet at an end. The question of debarring illiterates, of whatever sex or color, is under discussion. Eighteen states now apply a literacy test. Of these, some require that voters shall be able to read; others insist that they shall be able both to read and write. The test is usually given by the registrar of voters or by the election board, and in that case often turns out to be a perfunctory affair. Administered by these bipartisan officials, it does not shut out most of those who ought to be excluded. It fails to exclude large numbers of applicants who can barely write their own names and who have great difficulty in reading, much less understanding, simple paragraphs in any newspaper.

THE QUESTION OF A GENERAL LITERACY TEST.

New York State has had, for some years, a new type of literacy requirement which virtually operates as a mild intelligence test. The requirement is that every new voter who cannot present a certificate of graduation from the fifth grade of an elementary school in which English is the language of instruction (or from a higher school) must pass a literacy test *administered by the school authorities*, not by the election officials.[1] The test is uniform throughout the state. It consists of a paragraph of simple English (about 100 words), which each applicant is first required to read. He must then answer in writing six or eight easy questions based upon the paragraph. This plan, however, has not worked any too well because of partisanship in its administration.

THE NEW YORK PLAN.

In any event, the adoption of a stringent literacy test is always opposed by the practical politicians of all parties. They argue that political capacity is not related to education. Men who can neither read nor

[1] Persons who have attended an evening school and completed a prescribed amount of work are given a certificate of literacy without taking the test.

write are required to pay taxes, they point out, and to serve in the army during war, as well as to perform other civic obligations. That argument, of course, is not relevant to the issue. The real question is whether the giving of the ballot to illiterates is desirable in the general interest, and to that question there can be but one answer. Giving the ballot to anyone who cannot read or understand it is surely not in the public interest. This is particularly true in communities which use the initiative and referendum, thus submitting a long list of complicated questions to the decision of the voters.

THE ARGUMENT FOR AND AGAINST IT.

People do not always seem to realize that the ballot is potentially the most dangerous weapon that can be placed in the hands of any man. As an instrument for doing damage on a nation-wide scale, when unwisely used, there is nothing that compares with it. Its capacity for harm is surely not diminished when it is placed in the hands of men who do not know what they are voting for or against. Literacy is not a luxury in America, with free day schools for children and free evening schools for adults. No alien who cannot read and write is eligible to be naturalized. No illiterate, in most states, is allowed to serve on a jury. It has now become virtually impossible for anyone to get or hold a job above that of a common laborer unless he can read and write. When these things are considered, the literacy requirement for voting does not seem to be an unreasonable one.

The idea that the average voter really understands the problems of American government today is one of the agreeable fictions that have come down to us from pioneer days when there was some basis for it. Just run through the pages of the *Congressional Record* for any session of Congress. You will find discussions relating to deficiency appropriations, rediscount rates, railroad differentials, immigration quotas, cartels, the freezing of foreign credits, amortization of plant expansion, excess profits taxes, gold and silver purchases, capital levies, credit inflation, agricultural adjustment and farm loans, collective bargaining, dollar devaluation, stabilization of exchange, equalization funds, social security, unemployment insurance, public utility regulation, the guarantee of bank deposits, and many other topics of equal complexity. It may be doubted whether one American citizen in five has any clear comprehension of what most of these things mean. Certainly not one in a hundred understands them in all their applications. If he is not out of work, the average voter is busy. When he is not busy, he is tired. When he is not tired, he is worried. To ease his mind he reads the sports section of

THE INCREASING DIFFICULTY OF INTELLIGENT VOTING.

the newspaper or listens to the radio, from neither of which does he get much real enlightenment on public issues.

Some states still maintain a tax qualification for voting. In eight of them, every voter must have paid a poll tax.[1] The usual argument for imposing a tax qualification is that nobody should have a voice in spending public money unless he has contributed some of it. But this argument errs in assuming that the only people who pay taxes are the ones who pay directly. What about the *indirect* taxpayer? Everyone who pays rent pays taxes. Everyone who buys goods pays taxes. Every grocery bill, doctor's bill, or gas bill is a tax bill in part. A portion of it goes to pay the taxes which are levied on grocers, doctors, gas companies, and others. Between taxpayers and non-taxpayers it is not possible to draw a sharp line of distinction. Many of those whom we call "large taxpayers" are nothing but middlemen for others. They are landlords, merchants, or manufacturers who collect taxes in rents or prices and then pass them along to the public treasury.

TAX QUALIFICATIONS FOR VOTING.

Citizenship has now become an absolute requirement for voting. None but American citizens are permitted to vote in any part of the United States. The minimum voting age is twenty-one, except in Georgia, where it has been reduced to eighteen. The argument for this reduction, which is under discussion in other states, is that boys who are old enough to be drafted into the army are old enough to vote. All the states prescribe a certain minimum requirement of legal residence, ranging from six months to two years. Sometimes there is a double requirement, such as three months in the county or city and a year in the state. Legal residence, however, does not necessarily involve actual residence. One may be a legal resident of a state or city while actually living, perhaps for several years, somewhere else. President Roosevelt was a legal resident of Hyde Park, New York, a registered voter there, although for many years he had spent the major portion of his time elsewhere — at Albany or in Washington. A voter's legal residence is where he claims his home, or, as a judicial decision once expressed it, "the place from which, when going, he goes, and to which, when coming, he comes." It is not necessarily the place at which he stays.

CITIZENSHIP, AGE, AND RESIDENCE.

There are certain disqualifications which also ought to be mentioned. These include conviction for certain serious crimes. Election frauds are sometimes penalized by disfranchising those convicted of them. Some states exclude from their voters' lists all soldiers, sailors, and marines in active service. Insane

DISQUALIFICATIONS.

[1] As already indicated, there is a movement to require the abolition of poll tax payments as a requirement for voting; but Congress has not yet taken the initial step in that direction.

persons and those confined in certain public institutions of incarceration are also barred. Legal residents of the District of Columbia are not disqualified from voting, but they never get an opportunity to vote because no elections are ever held there. The District has neither presidential electors, senators, representatives in Congress, governor, assemblymen, mayor, or councilors. It is ruled by three appointive federal commissioners.[1]

SUMMARY.

Hence, when we say that "universal suffrage prevails in the United States," the saying is only roughly correct. To be accurate one should say that in the United States a person usually has the right to vote if he or she is (a) a citizen, (b) twenty-one years of age or over, (c) a legal resident in a given state and locality for a prescribed length of time, (d) able to read and write, in states which have literacy tests, (e) a taxpayer, where so required, (f) not disqualified in any way, and (g) forehanded enough to get registered in time. These various requirements, taking them together, shut out at least ten million adult inhabitants of the United States.

REGISTRATION OF VOTERS.

No one is registered as a voter for national elections. Each state makes provision for the enrollment of voters, and these lists are used at the national elections. Each state performs the work of registering voters according to its own methods, and these methods differ in efficiency from state to state. In any event the national government has no control over them. On the other hand, Congress has the right to judge the qualifications of its own members; hence, if a senator or representative appears to have been chosen through the wrongful inclusion or exclusion of names on the voters' lists, he can be denied a seat. This, in a roundabout way, gives Congress a means of insisting upon fair play in the registration of voters.

THE SLACKER VOTE.

People in general are more insistent on having the right to vote than upon exercising this right. Threaten to take a man's voting privilege away, and he will fight like a gladiator to retain it. But give it to him, and he will often tuck it away in moth balls. There are millions of eligible voters who never register, and millions more who register but do not go to the polls. In the most hotly contested presidential elections at least twenty per cent of the registered vote remains unpolled. In state and local elections the percentage of stay-at-homes is frequently twice as large. Some years ago there was a feeling that the situation might be improved by permitting absent voting; that is, by allowing voters whose business takes them away from home on election day to vote before they go, or to send their

[1] See Chapter XXXIII.

ballots by mail. Absent voting is now permitted in forty-four states; but the results have not been up to expectations. Relatively few voters take advantage of the opportunity.

Various other remedies for nonvoting have been proposed. Compulsory voting has been advocated, but does not exist anywhere in the United States. In some other countries the procedure is to impose a small fine upon every voter who, without valid excuse, stays away from the polls on election day; or, for repeated absences, to strike his name from the voters' list altogether. But such measures have not proved to be generally effective. In some cases, the compulsion has merely availed to increase the number of blank ballots which voters drop in the box. Anyhow the voter who goes to the polls because he will be fined for staying away is not likely to mark his ballot with much discrimination. Voting is a duty which ought to be performed from motives of civic responsibility, not from fear of the penalties. People do not become good citizens by going to the polls. They go to the polls because they are good citizens. They go because they are interested. They stay away because they have no interest, or too little interest, in the issues or the candidates. And when one reflects upon the kind of issues and candidates that are sometimes presented to them, this lack of popular interest is not altogether surprising.

COMPULSORY VOTING.

Energies ought therefore to be concentrated upon the task of clarifying the issues, vitalizing the party system, and improving the quality of the candidates as a means of getting the people interested, informed, and aroused between elections. Registration should be made less irksome, the ballot simpler, elections less frequent, party cleavages more distinct and vital, and party programs less evasive. Above all, our campaigns of civic education should be more comprehensive, more persistent, and more effective in reaching those sections of the electorate which are most in need of sound information. Too many such campaigns begin and end where the need is least — among business and professional organizations, in women's clubs, in the editorial columns of newspapers, and on the radio at hours when most voters are at work. Enterprises in civic education should be carried to the factory gates and into the workers' homes. Most important of all, they should be dramatized to catch the imagination of those whom the gospel is intended to reach.

REMEDIES FOR NONVOTING.

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CHAPTER VIII

POLITICAL PARTIES IN NATIONAL GOVERNMENT: WHAT THEY ARE AND WHY THEY EXIST

However combinations and associations of the above description [political parties] may now and then answer public ends, they are likely, in the course of time and things, to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the Power of the People and to usurp for themselves the reins of government. . . . — Washington's *Farewell Address*.

The Power of the People, as Washington termed it, is ineffective without leadership. This axiom of the science of government may be regarded a self-evident one, if anything is. Sixty million American voters constitute an enormous repository of political power, but without leadership and direction this reservoir of popular sovereignty would dissipate itself into numberless channels and become quite futile. Thereby it would engender governmental chaos and probably result in the complete abolition of all open political dissent, as it has done in some European countries. The insistence upon unified leadership, even though it may involve the giving of dictatorial power to some one man, is a reaction from the ineffective direction of the Power of the People.

POPULAR SOVEREIGNTY IS FUTILE WITHOUT DIRECTION.

Government by free political parties is merely another name for democratic government. Nowhere has there ever been a free government without political parties. Political parties existed even in ancient republics and mediaeval cities, although they were not known by that name. There were Lancastrians and Yorkists, Cavaliers and Roundheads in England long before the American Revolution. There were Whigs and Tories in the thirteen colonies. These rival factions sometimes settled issues by breaking heads rather than by counting them, but they were the ancestors of our political parties at the present day.

PARTIES BEGAN WITH HUMAN NATURE.

The men who framed the Constitution of the United States did not believe in party government. On the contrary, they sought to provide a scheme of government which would be free from all "violence of faction," as Madison called it:

OPPOSITION OF THE FATHERS TO THE PARTY SYSTEM.

Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . . By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[1]

Thus it was Madison's idea that a well-constructed government would keep groups of people from organizing in response to a common impulse; and his associates, including Washington, shared this view. So they ignored political parties altogether, making no mention of them in the Constitution. But everyone now realizes that a government has no energy of its own and must be propelled into action. Its motive power is furnished by representatives whom the voters elect, and in the nature of things the voters cannot intelligently elect anybody without organization and leadership. Give people the right to govern themselves, to choose their own representatives freely, and to speak their minds without let or hindrance — do this and political parties will inevitably appear, no matter what the Constitution may intend. It has been so in America. The stone which the builders rejected has become the chief stone of the corner. The only way to silence the rivalry of political parties is to abolish free elections, free discussion, and free government.

WASHINGTON'S ANTIPATHY TO "THE SPIRIT OF PARTY."

For a short time after 1787 no regular political parties made their appearance in the United States. Washington's election was unanimous on both occasions. But before the end of his second term he saw indications that "the spirit of party" was rearing its sinister head and in his farewell address tried to put the people on their guard against this danger. "In the most solemn manner" he warned the nation "against the baleful effects of the spirit of party generally," and declared that it had no place in "governments purely elective." His warning was so earnest that it deserves inclusion here:

I have already intimated to you the danger of parties in the state, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baleful effects of the spirit of party generally. . . . It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. . . . There is an opinion that parties in free countries are useful checks upon the administration of the government, and serve to keep alive the spirit

[1] *The Federalist*, No. 10.

of liberty. This within certain limits is probably true — and in governments of a monarchical cast patriotism may look with indulgence, if not with favour, upon the spirit of party. But in those of the popular character, in governments purely elective, it is a spirit not to be encouraged. . . . A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.[1]

But this clarion call for "uniform vigilance" fell upon heedless ears. Party divisions were bound to arise; in fact they had already arisen. The members of the constitutional convention had already divided on party lines although they did not realize it. Alexander Hamilton and Luther Martin, Edmund Randolph and William Paterson were as partisan in the convention as Andrew Jackson and John Quincy Adams became forty years later. From the very outset of their deliberations, the delegates were divided into two groups on questions of general policy. A majority believed in a real union; they wanted to make the states subordinate to the nation and to bestow large powers upon the central government. These were the Federalists. On the other hand there was a strong minority of delegates who desired that no power should go to the central government if it could possibly be left to the states. These were the Anti-Federalists.

THE BEGINNINGS OF AMERICAN POLITICAL PARTIES.

THERE WERE PARTY GROUPS EVEN IN THE CONSTITUTIONAL CONVENTION.

These two groups continued their rivalries during the contest for ratification. The Federalists supported the new Constitution in the various state conventions, while the Anti-Federalists opposed it. But the line of demarcation between the two was not yet a rigid one; and, when the Constitution was finally ratified, the Anti-Federalist opposition naturally died down. Washington, when he formed his first administration in 1789, tried to complete the healing of the breach by taking into his cabinet the two outstanding leaders of divergent political thought, Thomas Jefferson as secretary of state and Alexander Hamilton as secretary of the treasury.[2] For the rest, however, he chose his appointees from the Federalist ranks.

THE FEDERALISTS AND ANTI-FEDERALISTS.

Thus the Federalists were actually in control, although disclaiming all idea of partisan government. The country rallied to the new administration, partly because people wanted to give it a chance and partly because the improved economic conditions were thought to be due to it. The excesses of the French Revolution (1789–1795) likewise disgusted public opinion in

THE FEDERALISTS IN THE SADDLE (1789–1800).

[1] *The Writings of Washington*, edited by L. B. Evans (New York, 1908), p. 539.

[2] For the interesting story of the rivalry between these two notable statesmen, see Claude G. Bowers, *Jefferson and Hamilton* (Boston, 1925).

America and led the voters to think more of internal order and national defense than of state rights and individual liberties.

THEIR POLICY AROUSES OPPOSITION.

Still, the activities of the new federal government, more particularly the work of Alexander Hamilton, aroused a good deal of opposition. To the farmers and frontiersmen, Hamilton's new deal looked like a surrender to the moneyed and shipping interests. Jefferson, whose lack of sympathy with Hamilton was not concealed even while he was a member of the same cabinet, presently came to be recognized as the champion of the opposition, and his followers (strange as it may seem today) began to be called Republicans.[1] Washington did not align himself openly with either side and until his retirement from office managed to keep "the violence of faction" from becoming "a fire not to be quenched."

THEIR DISUNION UNDER ADAMS.

But when he retired to Mount Vernon, and John Adams became his successor, the breach rapidly widened. Hamilton could not work in harmony with Adams; and this dissension weakened the Federalists. This gave Jefferson and his followers a chance to make headway with the people. By their support of the Alien and Sedition Acts (1798), moreover, the Federalists committed a serious error; for the feeling against this legislation was so strong that every prosecution provided the occasion for a popular demonstration against the Federalists. At the election of 1800, therefore, Jefferson was able to win the presidency, and his followers assumed control of the national government.

THE JEFFERSONIAN VICTORY OF 1800.

The election of 1800 disclosed a clean-cut division into political parties, not merely among the leaders but among the people. The agricultural population of the country, the back-country grain growers, for the most part supported Jefferson; the industrial and the trading interests of the seaboard fringe went chiefly to Adams. The change from Adams to Jefferson was, therefore, a turnover of much political significance. The Federalists had placed more emphasis upon order than upon liberty. Jefferson and his supporters professed a philosophy of government which laid stress upon the natural rights of the citizen. But while they reversed some of the Federalist policies after coming into office, they did not abandon any of the powers which had been acquired for the new national government. They continued the protective tariff; and in purchasing Louisiana Jefferson gave

SUPREMACY OF THE REPUBLICANS (1800–1824).

[1] Later, in the "reign" of Andrew Jackson, they came to be called Democratic-Republicans. Still later they became known as Democrats, while their opponents assumed the designation of Whigs and then Republicans. All this explains why Jefferson is often called a founder of the Democratic party, though he called himself a Republican.

the Constitution a wider stretch than it had ever been given by the Federalists. Nevertheless, Jefferson remained strong in the confidence of the people, as his reelection proved in 1804; and he was able to pass the presidency to his disciple, Madison, at the close of his second term. During the two administrations of Madison, the Federalist party still further disintegrated, and at the election of 1820 placed no candidate before the people. With the reelection of James Monroe in 1820, the Jeffersonian Republicans were in complete control, their candidate having carried every state in the Union.[1] The Federalist party went out of existence.

THE PARTY CHAOS OF 1824.

But no single party ever remains permanently in control of a free government. A political majority, when it becomes too strong, invites disintegration within its own ranks. In this instance the triumphant leaders found that they could not act together; so they went their several ways, each carrying a section of the party with him. Henry Clay, John C. Calhoun, William Crawford, Andrew Jackson, DeWitt Clinton, and John Quincy Adams each had his following. Party politics, for a time, gave way to personal politics. It was for this reason that the people failed to give any presidential candidate a majority in 1824 and thus compelled the House to make the choice. The action of the House in electing John Quincy Adams instead of Andrew Jackson served to unite most of the erstwhile personal factions behind these two rival leaders, one group calling itself the National Republicans (later Whigs) while the other Democrats adopted the designation Democratic-Republicans. The election campaign of 1828 was fought by these two parties, and Jackson won.

THE ELECTION OF JACKSON AND THE ERA OF DEMOCRATIC SUPREMACY (1828–1840).

"The election of General Jackson to the presidency," says Edward Channing, "was the most important event in the history of the United States between the election of Jefferson in 1800 and that of Lincoln sixty years later." [2] Every President down to 1828 had come from Virginia or Massachusetts. They had been drawn from the Brahmin caste of American society. Even Jefferson and Madison, although holding liberal views, represented in their education and habits the courtly standards of the Virginia gentleman. Jackson, by way of contrast, was a product of the new West. He embodied the spirit of the

[1] One elector from New Hampshire gave his vote for John Quincy Adams for President, and thus deprived Monroe of a unanimous election. It has been frequently said that this recalcitrant elector did so in order to prevent anyone else from sharing with Washington the honor of a unanimous choice; but this statement is not true. The elector had other reasons for his action. See Edward Stanwood, *A History of the Presidency* (revised edition, 2 vols., Boston, 1928), Vol. I, p. 118.

[2] *The United States, 1765–1865* (New York, 1896), p. 208.

frontier. A fighter by instinct, his whole life had been spent in fights — against Indians, Englishmen, and reactionaries. After his election to the presidency he kept on fighting — against everything that he regarded as the enemy of the common man.

Jackson gave the United States its first new deal. His policies were forceful; they made him warm friends and bitter enemies. Above all, they solidified the division of the people into two regular parties, one conservative and the other more liberal, then known as Whigs and Democrats.[1] Jackson's extension of the spoils system made his party organization stronger by giving it something tangible to fight for. Even more far-reaching in its effects upon the American party system was his successful fight to break up the congressional caucus as a mechanism for nominating presidential candidates, thus paving the way for the rise of the national party conventions.

THE ALTERNATIONS AND REORGANIZATIONS OF THE PERIOD 1840–1860.

The Democrats continued to hold power until 1841, having reelected Jackson in 1832 and named Van Buren as his successor in 1836. Then commenced an era of party alternation in office. The issue of slavery came more and more to dominate the political arena, and in the end it split both the Whig and Democratic parties asunder. During the middle fifties a new Republican party arose from the ruins of the old Whig organization and clinched its position by securing the election of Lincoln over a divided opposition in 1860. This election ushered in a period of Republican control of the presidency which continued for twenty-four years, from 1861 to 1885.

THE EFFECT OF THE CIVIL WAR ON PARTY STRENGTH.

The Civil War, while it lasted, drew into the Republican ranks all those who believed in "the unconditional maintenance of the Union, the supremacy of the Constitution, and the complete suppression of the existing rebellion with the cause thereof by all apt and efficient means." It was by appealing to the voters on this program that the Republicans reelected Lincoln in 1864. When the war ended, it left the Republican party strongly entrenched. Then came the difficult task of reconstruction, which kept sectional bitterness alive; and it was not until the end of Grant's second term (1877) that the two great parties began to align themselves upon issues unconnected with the Civil War.

One of the legacies of the war was a high tariff, and the continuance of a protective policy during the seventies drew to the Republicans the

[1] The Whig party was organized in 1834 by a combination of the National Republicans with the Anti-Masonic group and dissident Democrats who had been alienated by certain acts of President Jackson.

support of the large business interests of the country. Questions of finance and currency also came to the front during this period, and they were dealt with by Republicans in a way which drew support from those who believed in conservative legislation. The Democrats, on the other hand, made their appeal to the friends of tariff reduction, to the agricultural voters of the South, to those who had radical views on matters of finance and currency. Grant, Hayes, and Garfield successively carried the Republican standard to victory during these years, and it was not until the election of 1884 that the Republican hold upon the presidency was relaxed. Even then, the triumph of Grover Cleveland was due to the weakness and indiscretions of the Republican candidate.

ALLIANCE OF THE REPUBLICANS WITH THE BUSINESS INTERESTS.

THE ELECTION OF 1884.

At each of the next four elections the tariff figured as a prime issue, although the Democratic adoption of a free-silver program in 1896 thrust the question of bimetallism into the foreground. The Democrats did not find this issue a winning one and dropped it from their platform. Until 1912, therefore, the cleavage between the two major parties remained fairly clear, and it related more directly to the tariff than to any other issue. In 1912, however, there came a schism in the Republican ranks, a revolt against the alleged reactionary methods and tendencies of its leaders, with the resulting formation of the short-lived Progressive party. This division in the Republican ranks made certain the success of the Democrats and the election of Woodrow Wilson for his first term. By 1916 the breach had been somewhat healed, but a new issue had now thrust itself upon the political scene. The tariff dropped out of public discussion, and there were no currency questions in dispute. The relation of the United States to the World War, which for two years had been raging in Europe, was the chief issue in the minds of the people. President Wilson was reelected by the votes of those who appreciated his endeavors to keep the country out of war; but no sooner had he been inaugurated for his second term than circumstances forced America into the great conflict.

RECENT PARTY DEVELOPMENTS.

This war came to an end in 1918, and President Wilson went to Europe to help arrange a treaty of peace. Included in this treaty he brought home a covenant for a League of Nations and submitted these combined documents to the Senate for its "advice and consent." The Democratic party, through the President's action, found itself committed to the League; while the Republicans opposed America's adhesion to it. The treaty and covenant failed in the Senate, whereupon this issue (along with various others)

THE LEAGUE OF NATIONS ISSUE.

went to the people at the presidential election of 1920. The result was a Republican victory and a consequent relegation of the League issue to the background. President Harding, who took office in 1921, died before the end of his term and was succeeded by Calvin Coolidge, who had been elected with him as Vice-President. The latter won the election of 1924. Four years later the Republicans, aided by the general prosperity of the country, were once more victorious.[1]

THE GREAT DEPRESSION AND ITS POLITICAL EFFECTS.

At this election of 1928 the voters chose President Hoover by the largest majority that had been given to any candidate for more than a century. But President Hoover did not prove to be a favored son of fortune. The country, after its long session of abnormal economic prosperity, was heading into a severe business depression. During the four years of the Hoover administration, this situation grew steadily worse, and the people were quite responsive to the promise of a "new deal" which the Democratic platform held out to them in the campaign of 1932. On this platform Franklin D. Roosevelt was elected by a very large majority, carrying Democratic control of Congress along with him. Far-reaching projects of legislation were at once brought forward, and most of these were rapidly enacted into law. This New-Deal program served to break down the old party lines to a considerable extent, and out of this breakdown the Democrats gained a large accession of strength. At the election of 1936 they were overwhelmingly victorious, carrying every state in the Union with the exception of Maine and Vermont.

THE ANTI-THIRD-TERM TRADITION BROKEN.

During his second term, President Roosevelt continued the general policies of his first. His hold upon the rank and file of the Democratic party continued so strong that in spite of the anti-third-term tradition he was almost unanimously renominated in 1940. The ostensible reason for this radical departure from tradition was the critical condition of affairs in Europe, where Germany had gained complete mastery over France and was preparing to crush Great Britain. The potential danger to the United States, it was argued, made a change of administration at Washington undesirable. Then, in 1944, when the United States was in the midst of the Second World War the President once more became the candidate of his party and was reelected for a fourth term, thus establishing a record which is not likely to be surpassed for many years to come.

The foregoing paragraphs, in very brief review, have sketched the

[1] A more extended account of party evolution may be found in Samuel P. Orth and R. E. Cushman, *American National Government* (New York, 1931), pp. 165–214. See also Frank R. Kent, *The Democratic Party: A History* (New York, 1928), and W. S. Myers, *The Republican Party: A History* (revised edition, New York, 1931).

evolution of the two major political parties. This has been done for two reasons: first, because the American party system of today cannot be understood, in all its implications, without some knowledge of its historical background; and, second, because this background so admirably illustrates the law of the pendulum in politics. The Democratic party of today is not taking the general drift of its idealism from Thomas Jefferson but from Andrew Jackson. The Republicans, *mutatis mutandis*, are closer to the general objectives of John Quincy Adams than to those of Abraham Lincoln. The alignments of 1932–1944 are not, fundamentally, so very different from what they were a century ago; but they have undergone all sorts of twists and turns during the interim. History, moreover, shows that the law of the pendulum is continuously at work. A political party fights its way into power, integrating and strengthening itself as it goes; then almost from the hour of its triumph the process of weakening and disintegrating begins. The paths of glory lead but to eventual defeat.

SUMMARY.

Although the Democrats and Republicans have held their place as the two major parties during the past eighty years or more, various minor parties have come into the field from time to time, and these deserve mention in even the briefest outline of American political history. One is the Prohibition party, which held its first national convention in 1872. Its fundamental principle, as its name implies, is opposition to the manufacture, importation, and sale of intoxicating liquors; but the party platform has usually expressed itself on various other issues as well. Until 1920 its main purpose was to secure the enactment of prohibition; then for a dozen years its energies were devoted to the task of getting the eighteenth amendment enforced. Since the repeal of this amendment in 1933, the Prohibition party has been relegated to the background, but it is girding up its loins for a renewal of the fight.

MINOR PARTIES: THE PROHIBITION PARTY.

The Socialist party in the United States began its career as a national organization over forty years ago, but for some time previously there had been a Socialist-Labor and a Socialist-Democratic party. The Socialist party of today is the result of a partial union of these two earlier organizations.[1] Until a few years ago, its platforms called loudly for various economic and political reforms. Among the economic demands have been the public ownership of railroads, telegraphs, and telephones; the extension of state ownership to mines, forests, and other natural resources; the

THE SOCIALIST PARTY.

ITS PLATFORM.

[1] Not all the members of the Socialist-Labor party went into this union. So it continues in existence and sometimes puts candidates in the field, but they poll a very small vote.

socialization of industry; the provision of work for the unemployed; and the expansion of social security benefits; and among the political demands, the initiative and referendum on a nation-wide scale; the abolition of the United States Senate; the popular election of federal judges for short terms; and the termination of the Supreme Court's power to declare laws unconstitutional.

THE COMMUNIST PARTY.

The Communist party represents the extreme left wing among political groups. It is regularly organized and places its own candidates in the field. Probably its numerical strength is greater than is disclosed at the polls. Recently the party announced its formal dissolution and the organization, instead, of the Communist political association. Apparently the change was one of terminology, for the party reorganized under its old label in 1945.

LABOR GROUPS IN POLITICS.

There is no regular Labor party in the United States, but this does not mean that organized labor takes no part in national politics. The American Federation of Labor, the Congress of Industrial Organizations (C. I. O.), and the Railroad Brotherhoods embrace within their membership a very large number of voters. Their leaders are politically influential. The membership cannot be counted upon to vote solidly on either side in a national election, although there have been times (as in the presidential election of 1944) in the case of the C. I. O. through its Political Action Committee when it has gone very heavily to one of the major parties. Mention should also be made of Labor's Non-Partisan League and the American Labor and Liberal parties of New York state.

WHO CONSTITUTE THE PARTY

PARTY MEMBERSHIP AND HOW IT IS MADE UP.

On the face of things, a political party is a *voluntary* association of individuals. It attracts those voters who believe in its principles, program, or leaders. But this does not mean that the average voter sits down and after careful reflection decides that one of the major political parties is more closely in tune with his own political philosophy than the other. More often he just takes this proposition for granted. Every political party, accordingly, has a foundation of "regulars," men and women who stay in its ranks through thick and thin, no matter what happens. Most of these have inherited their political allegiance. They are Republicans or Democrats because their fathers and grandfathers were. Irrespective of issues, leaders, or candidates, these regulars can be counted upon. They would support Beelzebub for President if he had the right tag pinned on him. "Every strong party," a practical politician once remarked, "rests

I. THE "REGULARS."

on a solid foundation of fools." That is putting the situation rather strongly; it would be better, perhaps, to say that a political party depends to some extent on the unquestioning loyalty of its undiscriminating members.

It is these party regulars who carry the burden and heat of the day. They hold the offices in the party organization, serve on the various committees, collect the campaign funds, arrange the rallies — they do the thousand and one things which seem to be necessary in a well-organized political campaign. Behind these active regulars there is a much larger number of semiactive or inactive party adherents who rarely or never leave any doubt as to their regularity, although they do not show their participation in politics except by attending meetings sometimes and by voting always. At any rate the regulars form the party's minimum strength, its numerical rockbottom, no matter what the issues or who the candidates may be. The strength of partisan regularity varies in different parts of the country. On the whole, it is greater in the South than in the North, and in the East than in the West.

2. RACIAL GROUPS.

Politicians do not like to admit it openly, but every observer of the American political scene knows that voters of the same race tend to gravitate into the same political party. In the southern states, for example, virtually all the few colored voters were till recent years Republicans; and the same held generally true of colored voters in northern communities. Since 1932 the Democrats have managed to split the colored vote in northern cities and to capture a substantial fraction of it. Voters of Irish extraction in the cities of New England and the middle states have been chiefly affiliated with the Democratic party. In Boston, for example, fewer than five per cent of the Irish voters are normally Republican. In Philadelphia, on the other hand, there is a large Irish-Republican element. Among voters of German descent the tendency is to Republicanism, especially in the cities of the Middle West, but not strongly so. The Italians, as a race, have not gone largely into the ranks of any one political party, but are well distributed; and the same is true of the Jews. Citizens of Polish ancestry tend to be Democrats, while Scandinavians are inclined to Republicanism although not to the reactionary brand of it. But generalizations of this sort are open to numerous exceptions. The political behavior of all racial strains is somewhat volatile. What should be kept in mind is that racial and party lines often coincide — not precisely, but in a general way.

Much more important nowadays, in determining the party affiliation of the average voter, is his economic status — whether he is rich or poor,

successful in business or unsuccessful, debtor or creditor, one of the "haves" or one of the "have nots." Nearly one hundred and fifty years ago James Madison averred that the unequal distribution of property was the fundamental basis of party cleavage. "Those who hold, and those who are without, property have ever formed distinct interests in society," he wrote. "Those who are creditors, and those who are debtors, fall under a like discrimination." [1]

3. ECONOMIC STATUS.

The lapse of time is proving that Madison was right. One cannot fail to see that the inclination is for those who have no property to range themselves in opposition to those more fortunately placed. Shiftlessness lines up against thrift and clamors for security. In many of the larger American cities the political leanings of any neighborhood can be accurately judged by anyone who takes the trouble to look at the houses in which the people live. It is the east side against the west side, left wing against right wing, plebeian against patrician, as it was in ancient Rome. Sometimes it is difficult to determine whether the boundary follows racial or economic lines, for the two may be closely identified. A generation ago it used to be said that the party line-up in the agricultural areas of the United States was wheat versus cotton rather than Republican versus Democratic — in other words, that the farmer's vote depended on which crop he raised. To a certain extent, that is still true. The wheat and corn states still lean in one direction, the cotton states in another.

The influence of religion upon party politics is hard to gauge because people do not discuss it except in whispers. Yet the omens of its existence come boldly to the surface at times, as in the campaign of 1928 when a Catholic was one of the presidential candidates. Religious animosity can be turned by the party leaders to their own account more easily in some sections of the country than in others. Race and religion, moreover, are sometimes so closely conjoined that they are hard to separate. In the southeastern states the Democratic party is heavily of English descent and Protestant. But in Louisiana and New Mexico, which are heavily Catholic, the same party is dominant. In the New England states the voters of Irish and Polish descent, who are largely Catholic, tend to become Democrats; but the French Canadians (who are also Catholics) have tended to join the Republican ranks, and the Catholic Italians are not monopolized by either of the two major parties. Those who make appeals for political support on religious grounds realize that they are playing with dynamite and must keep their activities out of the open. But a great deal more of this work goes on, by whisperings, innuendo, and deeply shadowed appeals to intolerance

4. RELIGION AS A FACTOR IN POLITICS.

[1] *The Federalist*, No. 10.

than most citizens realize. Clergymen of all religious persuasions often take a hand in it.

5. SECTIONALISM.

Southern Democrats who move to the North frequently become Republicans in the new environment; while northern Republicans who migrate to the South even more frequently gravitate into the dominant party there. A changed social environment dictates the shift. It is natural that many voters should prefer the party which is steadily dominant in their home communities. It requires firmness of conviction to stand by the loser always, and there are numerous voters who decline to do it. They go with the assured winner, for it is from that source that all the patronage and political favors flow.

6. LEADERSHIP.

Sometimes a party is stronger than its leadership; but perhaps just as often the leader is stronger than his party. When the latter proves to be true, the party gains an accession of strength which it may not hold permanently. It would be fair to say that Jefferson, Jackson, Lincoln, Cleveland, Wilson, and the two Roosevelts were all of them extra vote getters for the party which they led. Confidence in the party's leadership counts for more than approval of the party platform when it comes to capturing the independent voter nowadays. This is particularly true of new voters — men and women who are voting for the first time. What the party stands for is embodied for them in the personality of its leading candidate, rather than in its official program. The presidential campaign of 1940 was a contest between two personalities rather than one between two parties. Leadership has become more important than it used to be. The time is gone when either of the major political parties can count upon victory irrespective of its principal nominee. The American voter is tending, more and more, to decide between men rather than between issues.

7. ORGANIZATION.

Victory at the polls depends upon gathering new adherents into the party's ranks; and this, in turn, necessitates organization. No amount of organization will suffice if the leadership is weak and the party program unpopular; on the other hand, when the balance is fairly even in other things, it is an axiom of practical politics that a superior organization will often turn the scale. And it is not merely, or even mainly, the organization at the top that counts. Organization at the bottom, in the townships, wards and precincts, is more important. Nor is the problem merely one of intense activity during the weeks immediately preceding the election. Good organization is an all-the-year-round affair. It involves getting voters into the party, not merely getting them to the polls. Some communities

are steadily kept in the party fold by superior organization irrespective of everything else.

8. INERTIA AND REVOLT.

Finally, inertia must be reckoned with as a factor of some importance. Men do not change their party as often as they change their minds. To leave one party and join another takes more self-assertion than some voters possess. The line of least resistance induces them to stay where they are. Nevertheless there is a certain fraction of the electorate which will bolt from the ranks if sufficient provocation is given. How large this fraction will be depends on the degree of provocation. The Democratic party gave its followers a large measure of it in 1928; and the Republican party followed suit in its own ranks four years later. In both instances the number of desertions from the party ranks mounted into the millions. At such junctures people tend to make their party allegiance a matter of free (if sometimes emotional) choice, but these occasions are exceptional, although not so exceptional as they used to be.

SUMMARY.

So what is the composition of a political party and how is it determined? An American political party is a mosaic made up of some millions of adherents who, by reason of ancestry, home influence, race, economic status, religion, place of abode, leadership, organization, inertia, or reasoned preference, allow themselves to be drawn into it. Someone has defined a political party as a group of men and women "who think alike on public questions," but such a definition runs wide of the realities. Like-mindedness among the members of a party is perhaps the least visible of all its characteristics. Each party has both conservatives and radicals within its own ranks. Each has members who think wisely, or think foolishly, or do not think at all. On every issue there are divergences of opinion even among the party regulars. Marching under the same banner, the rank and file are miles apart in their habits of thought. The problem of the party leaders is to keep the somewhat loose aggregation from flying apart.

THE REASON WHY PARTIES ARE INEVITABLE.

If all people thought alike on political questions, there would be no rival political parties. There would be one all-inclusive political group; as is the case under the totalitarian system of government, in which everyone is compelled to think alike if he thinks out loud. On the other hand, if every man thought differently from his fellows, there would also be no party organizations; for every voter would then be a political party unto himself. So the political party is an inevitable development under every form of government, except dictatorship on the one hand and anarchy on the other. In witness whereof one need only repeat that no country has ever

been able to maintain, over considerable periods of time, any form of democratic government without the aid of political parties. And it is safe to prophesy that no country ever will.

PARTIES HAVE NOT BEEN FORMALLY RECOGNIZED.

Yet, essential as political parties are to the proper workings of government in all democratic countries, they have been compelled to grow up without much nursing from constitutions or laws. Democracies have either ignored the existence of political parties altogether, or have merely intervened to check abuses. Totalitarian governments, by way of contrast, have not only given the party official recognition, but have made it an integral factor in the practice of government. In Russia it is the Communists, a unified party, which gives cohesion to all branches of government. The same was true of the Italian Fascists and of the German Nazis when they were in the saddle. State and party are identified in interest. But in the United States there has never been any open avowal of such identity, although the party in power has sometimes acted as if there could not possibly be any divergence between its own interests and those of the whole nation. In any event, the influence of parties in American national government is something that everyone knows, feels, and realizes. Party organization, activities, discipline, and leadership are facts and forces of great importance in the government of the United States.

BUT THEY CANNOT BE IGNORED BY STUDENTS OF GOVERNMENT.

So, while the Constitution of the United States may ignore the existence of political parties, the student of American government cannot. He must realize that the nation is governed by two sets of political institutions. One of them, regularly organized by the Constitution and the laws, we call "the national government." The other, wholly ignored by the Constitution and largely ignored by national laws, we call "the party system." The two have become inseparably linked together; they interlock at every point and make it impossible to understand one without a knowledge of the other.

THE PARTY SYSTEM CONTRIBUTES GREATLY TO THE COMPLICATIONS OF GOVERNMENT.

It is for this reason that government is such a complicated affair. There is a visible mechanism which functions in plain view. But behind it, providing it with momentum, keeping it lubricated, with hands on the throttle, stands a great array of forces which are only half visible, but are always at work. When people find the study of government a simple affair (as some of them say they do), it is because they see the husk and miss the kernel. They look at Congress in session and imagine that they are viewing the entire process of lawmaking. They read that

the President has sent some names to the Senate for confirmation and assume that this constitutes the whole process of appointment. It is as though one careful look at the exterior of an elephant would serve to impart a full understanding of pachyderm psychology. To master the superficial anatomy of a government is not difficult. Its physical contour, its shape and mass, are easily described. All this is very simple political biology. But the physiology of a government, its bones and muscles, its heart and brain, its temper and idiosyncracies — to master these things is a task that requires intelligence, industry, discrimination, and tolerance. Political parties have helped to make it so.

WHAT FUNCTIONS DO POLITICAL PARTIES PERFORM?

One sometimes hears the suggestion, from not overthoughtful sources, that it would be a good thing to "abolish political parties altogether" and to "elect candidates on their own individual merits." The answer is that you might abolish the parties, but in a democratic government it is quite impossible to abolish the functions which political parties now perform. What are these organic functions? In general, a political party now performs four of them. In the first place, it singles out political issues for presentation to the public. Every issue begins with the birth of an idea in somebody's mind. Not often is this somebody a politician, for the average politician rarely begets a new idea and sometimes does not understand an old one. At any rate, the new idea is presently transformed into a proposal of legislation; it is advocated and pressed forward by its friends; in due course it becomes a plank in a party platform, and thus evolves into a political issue. The party system nurtures it through these various stages. By means of their issues, programs, and platforms, therefore, the parties give the voter a choice among alternatives. There are always two sides to every political question, and sometimes more than two. What a political party does is to set this divergence sharply before the whole body of voters.

THE ORGANIC FUNCTIONS OF A POLITICAL PARTY:

1. TO SELECT PUBLIC ISSUES AND PRESENT THEM TO THE ELECTORATE.

An election under the party system is not merely a means of choosing public officials. It is also, in most cases, a referendum on public issues. The political opinions of individual voters are widely diversified, and if everyone held inflexibly to his own point of view there could be no *public* opinion at all. To make group opinion effective, it is necessary to find some common ground upon which, by yielding their individual preferences somewhat, large numbers of voters can be brought into general agreement. It is the function of a

IMPORTANCE OF THIS FUNCTION.

party organization to find this common ground. Or to express it in another way: the first organic function of a political party is that of preparing a political creed to which large numbers of voters will give their support.

It is true, of course, that political parties do not always display honesty and frankness in this work of formulating issues and taking a stand upon them. Sometimes they simply evade or straddle issues which are already dividing the country. A good example was given in 1924 when both the major parties dealt with the tariff problem in a series of hollow platitudes, and again in 1928 when they both evaded any forthright declaration on the question of prohibition by professing their allegiance to "law enforcement" in general. Or in 1940 when they carefully avoided any definite pronouncement on America's relation to the European war. Nevertheless, in spite of these evasions, the main issues at each election are usually separated, and set out in bold relief by the respective platforms or by speeches of acceptance delivered by the presidential candidates. Certainly they are less befogged than they would be if no such pronouncements were made at all.

ALTHOUGH IT IS NOT ALWAYS WELL PERFORMED.

Second, the political parties nominate candidates for public office. It is a venerable cliché of politics that "the office should seek the man." Perhaps it should, but it rarely does. It is candidates, not offices, that do the seeking, and they do it in such generous numbers that a preliminary sifting is necessary; otherwise the machinery of election would break down. Somebody must take in hand the job of winnowing a score of candidates down to two or three. The party organizations maintain selective machinery for this purpose. It consists of party committees, caucuses, conventions, primaries, and so on. If we insist on majority rule, there must be some way of getting the list of candidates narrowed down to a point where one of them has a chance of becoming the majority choice. If political parties were abolished, it would be necessary to find some other mechanism for accomplishing this.

2. TO SELECT THE CANDIDATES.

In the third place, it is the function of political parties to provide a system of collective and continuing responsibility. Responsibility, to be real, must be both collective and continuing. The mere fact that every individual officeholder is responsible to the people does not guarantee responsible government. Under a system of division of powers they must be *collectively* responsible, and to this end there must be some group or organization which recommends them to the voters and

3. TO ESTABLISH A COLLECTIVE AND CONTINUING POLITICAL RESPONSIBILITY.

takes the responsibility for what they do. As a penalty for inefficiency and a deterrent to any repetition of it, the mere turning an official out of his post when his term has expired avails but little. The penalty, to be effective, must also fall on his bondsmen: that is, upon the political party which by nominating him has vouched for his fitness.

HOW THIS FUNCTION IS PERFORMED.

The party thus serves as a guarantor, pledging its own good faith and reputation, at times staking its very existence upon the ability and integrity of the men whom it places in nomination for public office. If its candidates are elected and make good, the party gets the credit; if they are elected and fail, the party cannot evade the responsibility. Party leaders are well aware of this, and that is why they hardly ever neglect to remind the people of the distinguished personalities whom the party has put into office from time to time. A great and striking President becomes a permanent asset to the party which nominated him; a weak or inefficient chief executive becomes a continuing liability even after he has passed from the scene. In a word, the party system makes for organic as well as personal responsibility. Without parties the responsibility would go no farther than the officeholder himself, and it would end with the expiry of his term.

4. TO SERVE AS AGENCIES OF CIVIC EDUCATION.

Finally, the political parties assist the practical workings of popular government. Popular apathy is the great menace to free institutions. The awakening of the voter's interest and the promotion of political discussion are essential in any democracy which seeks to be worthy of its name. If every voter were left to inform himself on political questions and to vote without either guidance or leadership, no democratic scheme of government would survive. To bring out the voter, you must first bring out the issues and the candidates. Then you must get the voter concerned about them.

THEIR METHODS.

Now the political parties render a great service in this field of political education. They stimulate discussion by filling the newspapers with their statements and counterstatements, their claims and counterclaims, their preachments and propaganda. They attract the attention of the people by their rallies, radio broadcasts, parades, demonstrations, and straw votes; they bombard the voter with their circulars and campaign literature, pin a campaign button on him, set shrieking billboards before his eyes, put stickers on his automobile, and carry him (or her) to the polls on election day.

If all men took a keen interest in public affairs, studied them laboriously, and met constantly in a popular assembly where they were debated and decided, there would be no need of other agencies to draw attention to political questions. But in a modern industrial democracy, where the bulk of the voters are more

absorbed in earning their bread than in affairs of state, these conditions are not fulfilled, and in case no one made it his business to expound public questions or advocate a definite solution of them they would commonly go by default.[1]

It is true, of course, that a great deal of the literature put out by party headquarters during an election campaign does not possess much educative value. It is hokum in considerable part, and often hillbilly hokum at that. The same is true of the speechmaking by local partisans, whether on the stump or in front of the radio transmitter. To that extent the political parties render a service of doubtful value, so far as dispelling confusion from the minds of the people is concerned. Yet when all is said and done, the party organizations do stir the people from their mental inertia and compel some of them to think about public affairs. Indeed, the complaint is often made that they stir things too much and make the election campaign a serious interference with the normal course of business.

SUMMARY OF PARTY FUNCTIONS.

These four functions — formulating issues, nominating candidates, maintaining a collective and continuing responsibility, and stirring up the political interest of the people — would not be performed if party organizations (or something akin to party organizations) did not take them in hand. They would become everybody's business — that is, nobody's business. The critics of the party system direct their fire against the abuses which have developed in the performance of these functions. They keep reminding us that political parties often do their work badly, that their motives are selfish and their leadership sometimes corrupt — all of which is true. Crooks and chiselers get into party politics as into all other activities. But the question is not whether parties are sometimes inept, tricky, insincere, corrupt, or badly led: the question is whether we can get along without them, or without something like them. And if parties are inevitable in some form, as the history of free government proves, it would seem that the sensible course is to regulate them for their own good, improve their methods, reform their leadership, and eliminate the abuses so far as we can.

NEED OF MACHINERY TO CARRY OUT THESE FUNCTIONS.

To perform their functions satisfactorily parties must be given a fair chance. We should not complain because they build up a lot of machinery, for a complex task cannot be performed with simple agencies. Candidates must be brought forward; hence the need for caucuses or conventions or primaries. Candidates cannot be elected without effort. That is why a campaign requires funds, leaders, workers, and discipline. That is why we have party committees and officials, party contributions, and the

[1] A. L. Lowell, *Public Opinion and Popular Government* (New York, 1913), p. 61.

whole complicated mechanism of party organization, which we see at work in every campaign. The American party machine is not a chance development. Neither is it the product of human perverseness. It is not even the result of political indifference on the part of a people so engrossed in their own affairs that they complacently surrender the conduct of the nation's business into the hands of mediocrities who choose to make politics a profession. It is merely the outcome of a desire to do, in a way that seems logical, the things that have to be done in order to make popular government a success.

It will now become apparent, perhaps, why third parties come into existence only when the regular party system is not working smoothly.

ADVANTAGES OF THE TWO-PARTY SYSTEM.

The most satisfactory working of representative government is secured under a two-party system, one party unitedly supporting the administration, the other presenting a vigorous opposition. When its support is divided, an administration is not sure of its ground; it must compromise in order to command a majority in the legislative chambers; hence its policy cannot be firm or consistent. If, on the other hand, the opposition is divided, the administration will not be subjected to that vigorous and unrelenting pressure which is necessary to keep it on its mettle and to make it ever regardful of its responsibility to the people.

When the two-party system is functioning properly, there is no room for a third party or a fourth party — much less for a dozen of them, such as existed in the European democracies before their surrender to dictatorship. Multiple parties are usually the result of injecting some highly emotionalized religious, social, or sectional issue into politics. As a rule they are short-lived, single-issue organizations. They demand something for a group that feels itself ill-treated or ignored by the major parties. Under a properly organized party system, the things which any large number of voters really want will be seized upon by one of the two regular organizations and incorporated into its own program long before they can be used as the endowment of a new party. And even though a third party may get hold of a good issue, it must have leaders, machinery, and funds in order to make itself a power in national politics. Third parties flash into the political firmament from time to time, and shine brilliantly for the moment; but their life expectancy is usually short.

NO ROOM FOR THIRD PARTIES IN A SMOOTH-WORKING DEMOCRACY.

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CHAPTER IX

POLITICAL PARTIES IN NATIONAL GOVERNMENT: HOW THEY ARE ORGANIZED AND DO THEIR WORK

There are relatively few men who grasp the fact that one of the surest ways to succeed in politics is to give the people a good show. Give them a really good show and they will warm to you, rally around you, support you. At bottom, what they want is to be amused, not instructed. The thing they abhor is to be bored. — *Frank R. Kent.*

THE QUESTION OF DEFINITIONS.

It is a moot point whether political discussions should start with a definition or end with one. There are those who argue that nobody should attempt to discuss the place of political parties in government without first defining just what a political party is. But there are others who contend that it is impossible to frame such a definition until after one has found out what political parties do and how they do it. In other words it is the function that determines the form.

One difficulty arises because of the fact that a political party has to be viewed from two angles. First, it is an instrument for declaring principles and formulating a program. Second, it is a combatant organization, comprising leaders and followers, whose business it is to win victory at the polls as the essential first step towards carrying this program into operation. Thus a political party is both an exponent of public ideals and a functioning mechanism. Ostensibly, all its members are in allegiance to the same ideals; as a practical matter, most of them have only a shadowy notion of what the party is going to do in case it wins. Thousands of people belong to political parties and work diligently for success at the polls without knowing what the party platform contains.

THE NEED FOR ORGANIZATION.

Why do people, inspired by such varied motives, associate themselves together in politics? The answer is that every political party has an immediate, as well as an ultimate, objective. The immediate aim is to win the election and get control of the government. To achieve this immediate aim, the party must have an organization. Lord Bryce's statement of this matter is so well expressed that it deserves insertion here:

> Organization is essential for the accomplishment of any purpose. . . . To attempt to govern a country by the votes of masses left without control would be like attempting to manage a railroad by the votes of uninformed shareholders, or to lay the course of a sailing ship by the votes of the passengers. In a large country the great and increasing complexity of government makes division, subordination, coordination, and the concentration of directing power more essential to efficiency than ever before.[1]

American party organizations have developed from local and rudimentary beginnings, but they are now the most elaborate and efficient institutions of their type in any country. During colonial days there existed in various parts of the country, but especially in the New England towns, various social clubs, which became hotbeds of political discussion during the stormy days of stamp taxes and tea parties. The best known among them was the Caucus Club of Boston. In selecting its name this group coined a word which is now used throughout the English-speaking world. Local clubs in other parts of the country also played a considerable part in colonial politics. At the time of the French Revolution they reappeared as "Democratic Societies"; but since public opinion did not take kindly to their activities, they soon went out of existence.

EARLIEST FORMS OF PARTY ORGANIZATION.

Some form of organization was needed, however, to make the nominations for public office; and for the moment, the function of making the nominations for the presidency was usurped by the respective party representatives in Congress. No one invented this plan of making nominations and organizing the campaign; it was merely adopted as the easiest way. The legislators in Congress were party men; they represented all sections; they were already assembled; and it was much easier to have them do the work than to call special conventions.

THE CONGRESSIONAL CAUCUS.

But in due course the congressional caucus came to be regarded with disfavor by the rank and file of the party voters. It was looked upon as a method of nominating presidential candidates without giving the people any voice in the matter. This popular antagonism grew steadily and became overwhelming when the caucus chose Crawford instead of Andrew Jackson in 1824. So, "King Caucus" was compelled to abdicate. Jackson's victory at the polls in 1828 made this abdication permanent.

OBJECTIONS TO IT.

But what was to replace the congressional caucus as an agency for nominating candidates? The answer to this question was quickly provided by the rise of *party conventions*. Conventions of party delegates, elected for

[1] *Modern Democracies* (New York, 2 vols., 1921), Vol. II, pp. 546–547.

the purpose, were brought together to make the nominations. Thereafter, for three quarters of a century, district conventions, county conventions, state conventions, and national conventions made the party nominations in their respective fields of American government. Candidates for the presidency and vice-presidency are still placed in nomination by national party conventions, but primaries have now, for the most part, replaced the convention in the nomination of candidates for Congress, as well as for the various state and local offices.[1] Proposals to abolish the national party convention as a nominating body have been made from time to time, but they have not gained much favor. This is partly because many of the states have made provision whereby the party voters, in choosing delegates to the national conventions, may indicate their preference among the various candidates and may even pledge their delegates to vote for a designated candidate at the convention.

REPLACED BY THE CONVENTION.

Conventions can nominate candidates, but they cannot manage a campaign. To do this it is necessary to have committees. So committees were named by the earliest conventions to raise funds, get out election literature, and print ballots — for until about sixty years ago the ballots were not officially printed; they were merely "tickets" provided by the party organizations. Then, as the country grew in population and more voters had to be reached, the committees found more work to do. It became necessary to have subcommittees, to maintain a corps of paid workers during the campaign, and to raise much larger sums of money for campaign expenses. Little by little, in this way, the party organization became more extensive and more complicated. Every change introduced new complexities. The adoption of the direct primary in many of the states altered the method of making the nominations, but it did not simplify the mechanism or lessen the amount of work to be done. On the contrary, it increased the work.

THE GRADUAL ELABORATION OF INTERNAL MACHINERY.

So we have evolved, by gradual and natural process, that amazing network of conventions, committees, subcommittees, chairmen, secretaries, leaders, bosses, precinct captains, and other party functionaries, which now covers the land from sea to sea. These workers form a larger army of professional politicians than can be found in all the rest of the world put together. Their activity is ceaseless: raising money and spending it; planning campaigns and fighting them; nominating candidates and getting them

THE PRESENT PARTISAN HIERARCHIES.

[1] See Chapter XXXVIII.

elected. The work goes on without interruption from one end of the year to the other.

THE NATIONAL COMMITTEES.

Let us examine this organization somewhat more in detail, beginning at the top. Each political party has a national committee consisting of two delegates (one man and one woman) from each state, territory, and insular possession. These members are nominally selected by the national conventions, but they are really chosen by the respective state delegations at these conventions. If, however, the laws of any state or rules of the local party organization make provision for the selection of national committeemen by a state primary, or in some other way, the selection so made is always ratified by the convention. In about one third of the states some such arrangements have been established. A national party committee, therefore, has a membership of something over a hundred, equally divided between men and women. Like the Senate it is based upon the principle of state equality; but it affords representation to the territories and insular possessions, which the Senate does not.

THEIR WORK.

The work of the Democratic and Republican national committees, each in its own field, covers a wide range, although most of it is concentrated into the six months immediately before a presidential election. In the first place, these committees fix the time and choose the place for holding their respective national conventions. They issue the calls for the election of the delegates and arrange all the other preliminaries. Then there is the general planning of the election campaign and the selection of subcommittees to take charge of different branches of the work. Likewise the national headquarters attend to the preparation of campaign literature and its effective distribution. Speakers have to be secured; meetings provided for and announced; local committees must be set to work; causes of friction or dissatisfaction here and there have to be eliminated; campaign funds must be raised and apportioned; canvassing and newspaper propaganda organized; and arrangements made for getting out the vote on election day.

FUNCTIONS DELEGATED DOWN THE LINE.

It is not to be assumed, of course, that the national committee as a body looks after all these matters, or even most of them, during a presidential campaign. A large part of the responsibility is carried by the chairman, assisted by a few close advisers. Moreover, each national committeeman (with his woman associate) is to some extent in charge of the arrangements for his own state, cooperating with the state committee. The detailed work is in large measure delegated to subcommittees, state committees, auxiliary

committees, and local party organizations. But the general responsibility cannot be delegated, so that, to borrow a military metaphor, the national committee serves as the general staff of the party forces. The state and local organizations form a hierarchy of divisional, brigade, and regimental staffs which direct the operations of their respective units. The theory of party organization is that it is controlled from below, by the men and women in the party ranks. But in actual fact the control and direction, as in military organization, comes from above. It is only in the event of a mutiny that the ordinary soldier in the party ranks gets any measure of control.

THE CHAIRMAN OF A NATIONAL COMMITTEE.

The chairman of the national committee is the one who plans his party's strategy in the campaign. Ostensibly he is chosen by the committee, but in reality he is the personal choice of the party's candidate for the presidency. He does not need to be one of the committee members. Sometimes he is imposed on the committee without its being consulted. Anyhow, it is an unwritten law that every presidential candidate has the right to name the man who is to conduct his campaign, and usually he selects the one who has managed his fight for the nomination.

HIS QUALIFICATIONS.

The chairman's job calls for a super-politician. It requires adroitness, courage, tact, and boundless energy. The chairman "must be a master of details, and at the same time capable of taking a correct view of the general situation and endowed with an unlimited capacity for hard work. He must possess the confidence of party leaders and have an almost intuitive grasp of the popular feeling. He must keep in touch with every fibre of the organization, holding frequent conferences with state chairmen in the most important and doubtful states. . . . He must be conciliatory, secretive yet approachable, keen in his choice of helpers, able to command the service of the most effective workers in the party, and capable of making them work in unison without overlapping." [1] There are not many who can command all these qualities.

HIS FUNCTIONS.

The national chairman is often a factor of great importance in determining the party's success or failure at a presidential election. He must select the vulnerable spots in the fortifications of his adversaries, and bolster up the weak places in his own. He virtually decides how and where the campaign funds of his party shall be spent, allotting them as his judgment dictates to this or that purpose, or to this or that section of the country. To do this success-

[1] P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3rd edition, New York, 1924), pp. 173–174.

fully requires him to be an adroit handler of men, able to generate a "will to victory" among his lieutenants. After the election, if his party wins, he is usually given an influential voice in the distribution of patronage. He knows, of course, the ones who have been of most help in the campaign and must make it his business to see that they or their friends are duly rewarded when the spoils of political victory are distributed. To this end the chairman of the national committee is sometimes made a member of the cabinet.[1]

THE SECRETARY AND THE TREASURER.

Two other important party officers are the secretary and the treasurer of the national committee. The secretary is the office man in charge of his party's national headquarters, supervising the enormous amount of correspondence which comes and goes, besides handling innumerable details relating to the itineraries of campaign speakers, the publication of campaign literature, and the coordination of the varied other campaign activities. Important also is the post of treasurer, for upon him rests the chief responsibility for raising the millions which are necessary to run the campaign. In this work he counts on the assistance of a finance committee.

AUXILIARY COMMITTEES.

Each national committee maintains a number of subcommittees, or auxiliary committees, made up to some extent from its own members but including also a number of prominent party workers outside. Among these the executive committee stands first in importance; but the finance committee, publicity committee, speakers' bureau, organization committee, and various other groups have plenty of work to do. All of them function under the immediate supervision of the national chairman.

THE CONGRESSIONAL CAMPAIGN COMMITTEES.

The work of the national committee and its subcommittees is restricted, for the most part, to presidential campaigns. The special function of assisting the party's candidates for the national House of Representatives is handed over to a separate committee, known as the congressional campaign committee. Each party maintains a committee of this type. It functions not only in the year of a presidential election but in the "off years," midway between presidential campaigns, when congressmen are being chosen. In organization it is somewhat like the national committee, being composed of one representative from each state chosen for two years by the party caucuses in the House. Each of the two major parties also maintains a small senatorial committee, the members of which are named by

[1] When this is done he is customarily given the office of postmaster general. The reason is that this office used to carry with it an extensive amount of patronage. The extension of the civil service in recent years, however, has greatly reduced it.

the Republican caucus and the Democratic floor leader in the Senate. These committees try to promote the interests of their respective parties at senatorial elections in the several states.

It goes without saying, however, that these various national committees and officials cannot do all the work which a nation-wide campaign involves. They must lean heavily upon the state party organizations. The details of state party organization will be explained later on; but it is worth while to mention here that each state has its state chairman, its state central committee, and a number of subcommittees. Not only this, but there are county committees; and the organization finally ramifies down into cities, towns, townships, wards, and even into precincts. Thus the party organization forms a huge pyramid with the national chairman at its peak and the many thousands of precinct workers at its base.

STATE AND LOCAL AUXILIARIES.

In a national campaign this great machine, and every wheel in it, is run at full speed. From the smallest village or township committee through the district and state organizations, the party's entire strength is put forth in unison. For it must always be remembered that the outcome in the nation may hinge upon victory or defeat in a single state. New York turned the scale in 1884; California did it in 1916. A relatively slight lapse from sound political tactics was responsible for the defeat of Mr. Blaine in the one case and of Mr. Hughes in the other. On either occasion the shifting of a few thousand votes would have changed the line of Presidents. Mishaps of this sort have taught party leaders the value of capable guidance, good discipline, thorough organization, and intensive work, right down to the closing of the polls.

THE NEED OF INTENSE EFFORT IN A PRESIDENTIAL CAMPAIGN.

The presidential candidate, of course, is the most conspicuous figure in all this activity. The national chairman keeps in constant touch with him and is guided by his advice. Or, in some cases, the chairman is the adviser, the candidate deferring to his judgment. Before the advent of radio it was customary for presidential candidates to go about the country making speeches, and they still do it to some extent; but the art of broadcasting has greatly lessened the need. Nevertheless, what the candidate does and says during the campaign is still of far-reaching importance to his party. One bad slip may cost him votes by the tens of thousands. It is desirable, moreover, that representatives of the party all over the country shall sing the same tune without making discords. To this end they are provided with a speakers' handbook and other guides to exactitude, from which they extract their dehydrated oratory.

THE CANDIDATE'S PART IN IT.

The activities of a political party in a national campaign require large expenditures. In the presidential campaign of 1940, the national organizations of the two major parties spent several million dollars each. This was in spite of the Hatch Act, which sets limits on campaign contributions and expenditures.[1] For one must remember that the figures of reported expenditures under the provisions of this act do not tell the whole story. Interested individuals spend a good deal of their own money in promoting the election of their favored candidate. Volunteer speakers often pay their own expenses; people donate the use of their automobiles on election day; and newspapers often give a lot of valuable space to what ought to be rated as paid political advertising. The amount of free service rendered by party workers, moreover, would cost a stupendous sum if it had to be paid for. Just what a presidential campaign costs the country, in cash and service, is something that cannot be accurately figured. Twenty to twenty-five million dollars would probably be a conservative estimate. This seems a large sum, but it is less than fifty cents per vote cast.[2]

PARTY FINANCE.

To secure campaign funds, the first step is to send out circulars asking for contributions. These circulars go to all who have contributed in previous campaigns, and to others from whom subscriptions may for any reason be expected. A good deal of money comes in response to this preliminary call. But a second and more urgent appeal is usually required to stir up those who have not replied. No party war chest, however, can be filled merely by sending out letters. Personal solicitation must also be undertaken, especially to get substantial contributions. This work is done by members of the finance committees. Contributors are actuated in their giving by a variety of motives. Many do it because of their sincere desire to see the party and the candidate win; others, because they hope for favors in the event of victory. They believe it is good business policy to have influential friends in proximity to the throne. The motives of men are not always visible to the naked eye, especially in politics.

HOW CAMPAIGN FUNDS ARE RAISED.

Various old-time evils connected with the raising of campaign funds have now been eliminated by the legal requirement that the subscription lists be made public. An act of Congress, passed in 1925, requires the national party committees to file before the election detailed statements of all their receipts and expenses, showing who has contributed to the funds and where

THE CONTROL OF CAMPAIGN FUNDS BY PUBLICITY.

[1] Under the provisions of the Hatch Act, single contributions are now limited to $5,000. No political committee shall receive or spend more than $3,000,000.

[2] It has been estimated that the major parties, through national, state, and local committees, spent at least $28,500,000 in 1936 — or $0.67 for each vote cast in the elections.

the money is being spent. Similar reports must be made after the election and at stated intervals between elections. Limitations are also placed upon the amount of money which a candidate for election to the Senate or the House of Representatives may spend to secure his own election. And corporations are forbidden to make contributions to campaign funds. More recently, the Hatch Act forbids the active participation of all persons who receive money from the federal government and of state employees who are at work on any project to which the federal government contributes. Thus the law no longer looks upon the national party funds as political patronage to be used as the custodians see fit, but as semipublic money to be collected and disbursed under strict governmental supervision. One salutary result of this has been to make the party leaders more dependent upon small contributors and hence more directly accountable to the rank and file of the voters.

WHAT THE PEOPLE WANT.

The whole problem of campaign expenditures goes back to the people. Most voters enjoy a real campaign, the kind that stirs everybody's interest. But a lively campaign is certain to cost a lot of money — money for campaign literature and postage, for hall rent, for the traveling expenses of speakers, for newspaper advertising, radio broadcasting, parades, the remuneration of full-time workers, and all the rest. If the people resented this feverish activity (which is designed to arouse their interest), it would soon come to an end. But they do not resent it; they like it. They complain when the campaign is a dull one. And so long as the people relish the sort of campaign that costs money, one may rest assured that money will be raised and spent.

RELATION OF PARTYISM TO THE AMERICAN SYSTEM OF GOVERNMENT.

There is a reason (apart from the American genius for organization) why the American party system has developed so much machinery. It is not only because the country is so large, but because we have in the United States no single organ of government with power to shape the course of public policy. The President, Congress, the state executives, and the state legislatures all have a share in it. Yet public policy cannot be determined and put into operation unless the various participants act with some approach to unison; and it is to accomplish this that the political parties try to capture not only the higher offices, but the lower ones as well. The party organizations have become, in fact, the great policy-unifying factors in American government. The larger part of what Congress does is at the behest of the party leaders. The larger part of what it puts upon the statute books is by way of trying to put the party's avowed policy into actual operation. National, state, and local partisan-

ship are more or less closely identified all over the country. It occasionally happens, of course, that an individual voter supports one party in national elections and the other party in state elections; but an organization could hardly do anything of the sort. Party organizations are integrated all the way from top to bottom. They are a strongly unifying influence in American politics.

THE PRESSURE OF NONPARTISAN ORGANIZATIONS.

Recent years have seen the growth of various national organizations which, although ostensibly nonpartisan, are exercising a good deal of political influence by the pressure which they bring to bear upon legislative bodies. Among the best known are the National Farm Bureau Federation, the Chamber of Commerce of the United States, the American Federation of Labor, the Congress of Industrial Organizations, the American Legion, the National Association of Manufacturers, and the National League of Women Voters. These pressure groups have their affiliated organizations in every section of the country and can bring pressure to bear on any congressman from within his own home district. Hence they have always to be reckoned with when controversial legislation is being considered. Occasionally these nonpartisan pressure groups have shown themselves more powerful than the party organization in moulding the attitude of Congress. When important measures are under discussion, their leaders promote a barrage of telegrams and letters to congressmen as a means of influencing legislative action. These same leaders go to the microphone and over a regional or national hookup beseech their followers to bombard Washington by wire or air mail. On one notable occasion it is estimated that over one hundred thousand such telegrams and letters reached members of the United States Senate within a week. Because of the unity of interest which exists within each pressure group, and the intensity with which this interest is promoted, sometimes these bodies exert an influence out of proportion to their numerical strength.

SELF-INTEREST DIVISIONS THAT CROSS PARTY LINES.

Political parties, as such, do not count for so much as they did a generation ago. Economic problems have come to the forefront; and the contests over legislation have developed into struggles between cross-party groups which do not keep to the old party lines and are not amenable to party discipline. To the extent that governmental action now directly affects the pockets of manufacturers, merchants, farmers, workers, individuals on relief, veterans, and other organized bodies, one must expect these individuals and groups to seek their own advantage through specialized channels which they have at their disposal. So, they carry on

propaganda for their own specific demands; they support or oppose candidates on that issue; their representatives appear at committee hearings in Congress; and they focus upon the individual legislator all the pressure they can command. The congressman upon whom the pressure is concentrated does not have an agreeable time of it, as the barrage often hits him on both flanks. He will antagonize some voters in his own district no matter which way he turns. If he would rather be right than be reelected, he will follow his own judgment irrespective of the pressure; but the proportion of such congressmen is not excessive. So the art of government too often becomes one of yielding to what seems to be the stronger pull in this tug of war. It is not exactly "the greatest good of the greatest number," but the action which will least endanger his reelection.

There was a time, not so long ago, when a legislator could line up with his party leaders on every issue and trust that a reputation for party regularity would serve to get him renominated and reelected. It is no longer so. Today there is hardly a single issue that produces a clean-cut division on party lines in either the Senate or the House. In at least nine cases out of ten the vote shows some Democrats and Republicans on the same side. Conservatives of both parties often combine, and so do the more radical groups. Those congressmen who come from the agricultural states, or from the industrial states, often vote the same way irrespective of their party affiliations. On questions of foreign policy the breakdown of party lines is well-nigh complete. So, while party government still dominates the national capitol, its dominance is not nearly so complete as it used to be.

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PRACTICAL POLITICS. The actualities of party organization and the sinuosities of practical politics cannot be fully learned by a study of platforms, regulations, and handbooks; or even from the many excellent volumes which describe such things in general terms. For much illuminating material, one must review the experiences of men who have taken their places on the firing line in party battles, as given in such biographies as Allan Nevins, *Grover Cleveland* (New York, 1932), the *Autobiography of Robert M. La Follette* (Madison, 1913), Theodore Roosevelt's *Autobiography* (New York, 1913), Herbert D. Croly, *Marcus Alonzo Hanna* (New York, 1912), Harold F. Gosnell, *Boss Platt and His New York Machine* (Chicago, 1924), L. W. Busbey, *Uncle Joe Cannon* (New York, 1927), N. W. Stephenson, *Nelson W. Aldrich* (New York, 1930), William Lawrence, *Henry Cabot Lodge* (Boston, 1925), William F. McCombs, *Making Woodrow Wilson President* (New York, 1921), and William Allen White, *Masks in a Pageant* (New York, 1928).

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CHAPTER X

THE PRESIDENT

The President of the United States is both more and less than a king; he is also both more and less than a prime minister. The more carefully his office is studied, the more does its unique character appear. — *Harold J. Laski.*

This great office, the greatest in the world to which any man can rise by his own merits, was not intended to be what it has become. The architects of the American governmental system did not have in mind the creation of a chief executive who would be more than a king, or more than a prime minister. Their idea was that the post would be one of honor and leadership rather than of commanding authority. When they decreed that "the executive power shall be vested in a President" they did not realize that some day these nine words would serve to consolidate the largest amount of authority ever wielded by any man in a democracy. They did not realize that with the growth of the nation this office would inevitably become the focus of all federal authority and the symbol of national unity.

NINE WORDS OF GREAT SIGNIFICANCE.

Why was the presidency established? Largely because the experience of the country during the Revolutionary War and under the confederation had shown the urgent need for one. Executive work had been handled by committees of the old Congress, and later by secretaries; but this arrangement proved quite unsatisfactory, and it was generally agreed that in the new government a one-man executive ought to be provided. All the state constitutions had made provision for governors. A plural executive at the head of the federal government would place the nation at a disadvantage in its dealings with the states. It would be handicapped in negotiations with foreign countries. A plural executive could not be commander in chief of the army and navy. At any rate the decision to have a president was reached without much argument, although Edmund Randolph of Virginia registered objection on the ground that a single executive would serve as "the foetus of a monarchy." But how the chief executive would be chosen, whether he should be independent of Congress or not, and what powers he should have — these matters were not so easily decided.

THE NEED OF A SINGLE EXECUTIVE.

As for the proper term, method of selection, powers, and functions of the executive, there were nearly as many different opinions as there were delegates. Hamilton expressed a preference for life tenure, and a few others were willing that the President should hold office "during good behavior"; but the majority were for limited terms ranging from two to twelve years. After a good deal of discussion the delegates agreed on a seven-year term, with a provision against reelection; then they reconsidered the matter and ultimately fixed the term at four years with no limitation on the number of times that a President might be reelected to the office.

THE PRESIDENTIAL TERM.

The Constitution, therefore, contains no stipulation against a third term. But where the Constitution remained silent, usage stepped into the breach; and for over a hundred years the anti-third-term rule was commonly said to be one of the fixed traditions of American national government — a tradition so strongly buttressed by both time and logic that it seemed improbable that it would ever be successfully defied. Washington started the precedent by flatly declining a third term. But he did not base his declination on the idea that third terms would be either undemocratic or dangerous. He was then approaching the age of threescore and ten, and pleaded "the advancing weight of years." Jefferson declined to be a candidate after he had served two terms, and made the tradition stronger by basing his refusal on the expressed belief that third terms would be incompatible with the public interest. Jackson, in 1836, might have had a third term, but declined the opportunity. Indeed, as President, he had repeatedly urged a constitutional limitation of tenure to one six-year term. Grant and Theodore Roosevelt both sought third non-consecutive terms, but failed — one in the nominating convention, and the other at the polls. Calvin Coolidge could probably have claimed a third term by pointing out that, having come to the White House when his predecessor's term was more than half through, he had served less than six years in all; but he surprised the country by announcing in 1927 that he did not "choose to run." Thus the tradition seemed to be fairly well established; but in the summer of 1940 President Franklin Roosevelt decided to accept the Democratic nomination for the third successive time, and in due course was reelected. He was again elected in 1944, but died soon after his fourth inauguration.[1]

THE ANTI-THIRD-TERM USAGE.

From time to time, there have been proposals to amend the Constitution so as to make the question of presidential reeligibility more definite.

[1] For further information, see Charles W. Stein, *The Third-Term Tradition: Its Rise and Collapse in American Politics* (New York, 1943).

It is generally agreed that a four-year term, with no reeligibility would be too short. On the other hand, the present system means that a President who desires a second term must spend most of his first term maneuvering for it. One proposal is that a single term of six or seven years be fixed and no immediate reelection permitted. Another is to make the anti-third-term rule a written provision of the Constitution. Some have suggested that the rule as to term and reeligibility be left as it is, but that provision be made for the recall of the President by popular vote at any time.[1] This suggestion has found very little favor.

HIS POSITION IN RELATION TO CONGRESS.

Even more difficult than the question of term and reeligibility was the problem of how to choose the President. Most of the delegates favored a proposal to let Congress do the choosing, and that plan was provisionally adopted. But at a later stage the members of the convention became convinced that such an arrangement would destroy their system of checks and balances. The question was therefore reopened and finally settled in an entirely different way: namely, by the expedient of indirect election. There were a few who favored direct popular election, but the majority were strongly opposed to that plan because they feared that it would open the door to the choice of demagogues. Accordingly, they adopted the plan of indirect election by presidential electors because it seemed to have fewer objections than any other among the various methods proposed.

THE ORIGINAL METHOD OF CHOOSING THE PRESIDENT.

This plan, as outlined in the Constitution, is a relatively simple one and allows a great deal of latitude to the states. Briefly, it provided that each state should "appoint in such manner as the legislature thereof may direct" a number of "electors" equal to the state's combined quota of senators and representatives in Congress. For example, a state having two senators and five representatives would choose seven electors. In due course these electors were to meet, each group in its own state, and give their votes in writing for two persons, of whom at least one must not be an inhabitant of the same state as the electors. The ballots were then to be sealed and transmitted to the president of the Senate, who was directed to count them in the presence of both Houses and to announce the result. The person receiving the most votes was to be President, provided he obtained a clear majority of all the electoral votes, and the one obtaining the next highest number was to be Vice-President if he fulfilled the same requirement.

Some among the framers of the Constitution expected that very seldom would any candidate receive this clear majority. George Mason,

[1] On the recall procedure, see Chapter XL.

one of the leaders in the convention, predicted that it would not happen more than once in twenty elections. So provision was made that, in case no one obtained a majority of the electoral votes, the House of Representatives (voting by states and each state having one vote) should choose from among the five highest. Note that in thus "voting by states" every state was given an equal voice, no matter what its population. New York has forty-seven electoral votes, while Nevada has only three; but when the election is thrown into the House of Representatives the provision is that each of these states has one vote only. The congressmen from each can merely decide how the state's single vote shall be cast. In the event of a tie in the electoral vote of the nation, it was provided that the issue would be settled in the same way. The stipulation that the House should vote by states, not by individual members, is significant. This was looked upon as a very important concession to the small states and a partial compensation for what they had surrendered in the Great Compromise.

THE PROVISION IN CASE OF AN INCONCLUSIVE ELECTION.

The plan of indirect election had the merit of satisfying those who did not want the President elected directly by the people or directly by Congress. It gave the large states an initial advantage, but raised the small states to a plane of equality with them in case the electors failed to give any candidate a clear majority. The plan was adopted not because the makers of the Constitution believed it to be ideal, but because they felt that it was open to fewer objections than any of the other plans. They were overwhelmingly against direct popular election, for they had read ancient history to some purpose. They knew that tyrants and dictators in Greece and Rome had frequently been catapulted into their posts of power by the acclaim of the multitude. Let the states appoint thoughtful men as electors, therefore, and commit the choice of the President to these electors. This seemed to be a safe, if not an altogether democratic plan. The delegates felt that all classes of the people would be satisfied with it.

WHERE IT CAME FROM.

MOTIVES WHICH DICTATED THE SELECTION OF THIS MECHANISM.

For the moment, they were right. When the provisions of the Constitution were made public, there was almost unanimous approval of the plan for indirect presidential elections. Almost every other feature of the new Constitution was assailed; but this one escaped the barrage of criticism. And in the first two elections the scheme functioned exactly as its originators intended.[1] Everyone expected Washington to be chosen, and he was.

HOW IT WORKED IN THE EARLIEST ELECTIONS.

[1] In 1789 and in 1793 all the electors voted for Washington (thus making him the unanimous first choice), but their second choices were well scattered, thus indicating that they were using their individual judgment and were not being pledged in advance.

Then a different course began to shape itself. At the third election (1796) it was well understood, even before the electors met, that most of the presidential electors would vote for either John Adams or Thomas Jefferson, although in no case were any pledges exacted. In 1800 things were carried a step further. Two well-defined political parties, Republicans and Federalists, had now arisen, and at the election of that year both put forth their candidates. Electors were chosen on the understanding that they would vote for the nominees of their party. The Republican electors marked their ballots for Jefferson and Burr, while the Federalist electors did the same for Adams and Pinckney. No other candidates were considered.[1] Deliberation on the part of the electors thus became a fiction; henceforth they were to serve as mere automatons, selected because they would do what they were told to do. The heart of the original plan was cut out within ten years, and never since has there been any serious attempt to restore it.

The people, not the electors, have been choosing the President and the Vice-President for more than a hundred and forty years. This is because all the state legislatures have directed that presidential electors shall be chosen by popular vote and these electors are always pledged to the nominees of the national party conventions. The electoral college has thus lost all discretion in the choice of a President, but it continues to go through its gestures every four years. It has become an anachronism. Why, then, is it not abolished? The answer is that any proposal to abolish it would precipitate a controversy as to what provision should be made in case no presidential candidate received a popular majority at the polls. Obviously the present plan of equal voting by states in the case of an indecisive election ought to be discarded if the House of Representatives is to continue its constitutional function of breaking a deadlock; but the smaller states would be reluctant to ratify any amendment which surrendered their present status of equality.

RESULTS OF THIS CHANGE.

The election of 1800 was also significant in that it disclosed a serious flaw in the Constitution as the framers worded it. The Constitution in its original form provided that the electors should vote for "two persons" without designating which was the elector's choice for President and which for Vice-President. In 1800 Jefferson and Burr both received the votes of all the Republican electors, which meant, of course, that they got an equal number of votes. They had been put forward by one political party with the intention that Jefferson should be chosen President and Burr Vice-President; but the

A DEFECT IN THE ORIGINAL PLAN.

[1] Except that a Federalist elector in Rhode Island voted for Jay instead of Pinckney.

plan went awry because both received "the highest vote," which according to the Constitution was to determine the choice of a President, and neither obtained the "second highest," which was to designate the Vice-President-elect.

HOW IT EVENTUATED.

Happily, the framers of the Constitution had been foresighted enough to insert the provision that in case of a tie the House of Representatives should determine the choice; and the House did so, choosing Jefferson President on the thirty-sixth ballot after an exciting contest. Then, as a safeguard against any future confusion, an amendment (the twelfth) was added to the Constitution in 1804. This provided, among other things, that the electors in the several states should "name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President." So the electors now cast two ballots, where originally they marked only one.

THE INDECISIVE ELECTION OF 1824.

During the seventy years following the adoption of the twelfth amendment, presidential elections were held without any trouble of a serious nature. In 1824, it is true, no candidate for President received a clear majority of the electoral votes; and the House of Representatives once more had to make the choice. It selected John Quincy Adams, much to the disgust of Andrew Jackson's supporters, who felt that because Jackson had obtained more electoral votes than Adams he ought to have been chosen by the House. There was some talk of again changing the Constitution, but nothing was done.

THE HAYES-TILDEN CONTROVERSY.

It was not until the election of 1876 that another perplexing difficulty arose. From several states, on that occasion, two different sets of electoral certificates were received. Who should determine which of these was valid and entitled to be counted? The Constitution had not anticipated this eventuality; it merely provided that "the president of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted." As it happened, however, the Senate at this time contained a majority of Republicans and the House a majority of Democrats. Accordingly, if the president of the Senate took upon himself the duty of deciding which set of certificates ought to be counted, the election of Rutherford B. Hayes, the Republican candidate, would be assured. But if the question of validity were left for decision to the two Houses in joint session, then the Democrats would have a majority and the election would go to Samuel J. Tilden. As a further complication, the joint rules of the two Houses provided that no disputed election returns should be counted unless both the Senate and the House of Representatives, acting separately, should so authorize.

Neither House, of course, would vote to authorize the counting until the question of disputed votes could be settled. And each insisted on having the matter settled its own way. As matters stood there was no possibility that any of the disputed votes could be counted, or either candidate elected, unless the two Houses were willing to compromise their differences. In some countries such an impasse would have led to serious trouble. In more than one of the Latin-American republics, a less awkward situation has precipitated civil war. But in the United States the counting of electoral votes is the end of a revolution, not the beginning of one. So the statesmen of the two parties put their heads together and worked out a solution.[1] Briefly, they agreed that Congress should at once establish a special commission of fifteen persons: namely, five senators chosen by the Senate, five representatives named by the House, and five justices of the Supreme Court. This commission was to investigate the validity of the disputed returns and decide which ones should be counted. Then both Houses would accept their decision. The commission was quickly brought together; it heard both sides of the controversy; and by a majority of one vote its rulings determined the election of President Hayes.[2]

HOW IT WAS SETTLED.

While the matter was finally settled in this way, it had engendered a good deal of ill feeling. Congress felt the desirability of making sure that a similar deadlock should not occur again. After prolonged discussions and various delays, it finally enacted a statute (1887) dealing with the whole subject of disputed votes, and this law is still in force. It provides that each state must now determine, in the first instance, all disputed questions concerning the choice of presidential electors from that state. If in New York, for example, two groups of electors claim to have been chosen at the polls, and the courts of New York have decided in favor of one group, the votes of this group will be counted. But if the issue has not been decided by the state courts, each branch of Congress shall pass on the matter separately; and, if they fail to agree, then no votes from the state are to be counted at all.

ITS SEQUEL — THE ACT OF 1887.

Thus far we have been speaking of a presidential election from the

[1] P. L. Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876* (New York, 1906).

[2] Of the 369 electors, 184 were pledged to Tilden (Democrat), 164 to Hayes (Republican), and 21 votes were in dispute, namely, those of South Carolina, Florida, Louisiana, and one vote from Oregon. To the electoral commission the Senate appointed three Republicans and two Democrats, while the House of Representatives appointed three Democrats and two Republicans. Of the five Supreme Court justices, three had been Republicans before their appointment to the bench, and two had been Democrats. Thus the electoral commission, as finally constructed, contained eight Republicans and seven Democrats. All, however, took an oath to decide the issue on its merits and impartially. On every disputed question, nevertheless, the commission divided on straight party lines and gave the entire twenty-one disputed votes to Mr. Hayes.

standpoint of the Constitution and the laws. But from neither of these does one get an adequate idea of the way in which the election is actually conducted. The Constitution provides only three steps: the choice of electors, the voting by electors, and the opening of the electoral certificates in the presence of Congress. But in practice two other steps have developed, so that there are now five in all. The first three are of great importance, while the last two, the voting by electors and the opening of the electoral returns, have become mere formalities unless something quite out of the usual occurs.

THE PRESENT METHOD OF ELECTION.

PRESIDENTIAL NOMINATIONS

The first step in the choice of a President is the nomination of candidates, a matter on which there is not a word in the Constitution, for it was not intended that there should be any nominations. The process begins with the calling of the national party conventions, but before this is done there is always some informal grooming of prospective candidates. The call for a national party convention is issued by the national committee, which (as already explained) is a body made up of party delegates from all the states and certain outlying possessions.[1] Each national committee calls its own convention, decides the time and place, and makes the preliminary arrangements. Usually the calls are issued in January or February of a presidential year, and the conventions meet during the summer, a few weeks apart.

FIRST STEP: NOMINATION OF CANDIDATES.

STAGES IN NOMINATION PROCEDURE:

1. THE CALLS FOR THE PARTY CONVENTIONS.

During this interval between the call and the convention, the political parties in each state select their delegates. Until recent years, every state had twice as many delegates as it had senators and congressmen combined. But under a new rule of 1940 the Democrats allow two additional delegates to states that went Democratic in the previous presidential election. The Republican rules have been changed in 1913, 1923, and 1940. As they now stand, each state gets four delegates at large and two delegates for each congressman at large (if it has any),[2] together with three additional delegates if the state went Republican at the last presidential or senatorial election. In addition, each congressional district within the state is given one delegate if it cast 1,000 Republican votes at the last election and an additional delegate if it cast 10,000. Dele-

2. SELECTION OF DELEGATES TO THE PARTY CONVENTIONS.

[1] See p. 137.

[2] A congressman at large is one elected by the whole state and not by a congressional district. For the reason why states occasionally have congressmen at large see pp. 310–311.

gates are also allotted, by both parties, to the territories and insular possessions.[1] The total regular membership of each national convention is well over a thousand. In addition, each state is allowed an equal number of alternates, who serve in case any of the regular delegates are absent. Thus, with a full quota of delegates and alternates in attendance, the Democratic and Republican national conventions are huge, unwieldy gatherings. National conventions are also held by the Prohibition, Socialist, and Communist parties, but they are very much smaller.

THE ALTERNATES.

How are delegates and alternates chosen? Until the early years of the twentieth century they were always named by party conventions held in the states and congressional districts. Then, in 1905, Wisconsin originated the presidential primary, requiring delegates to be elected directly. Within the next two decades almost thirty states adopted the presidential primary in various forms. They provided for: (1) the direct election of delegates, who in most cases could be pledged to support some particular presidential aspirant; or (2) in two thirds of all cases, for a preferential vote to indicate the popular strength of all aspirants within each party; or (3) for both of these practices.[2] The movement declined rapidly after 1916. Eight states repealed their presidential-primary laws; two abandoned them as unconstitutional. In several states the law binds the delegates morally to support the popular choice — to their best judgment and ability (Ohio), by all honorable means in their power (Pennsylvania), as long as his nomination is possible (Maryland). Such injunctions have proved ineffective.[3]

METHODS OF CHOOSING DELEGATES AND ALTERNATES.

A NATIONAL CONVENTION AT WORK

Then comes the meeting of the convention. The Republican convention meets in one city and the Democratic in another; but the procedure in each case is much the same. The thousand delegates are seated in the front portion of a great hall, with the alternates occupying the rear. These delegates and alternates are mostly active party workers in their home states, with a good sprinkling of congressmen and ex-congressmen. Formerly they included a large quota of federal officeholders, such as postmasters; but the Hatch Act of

3. THE CONVENTIONS.

[1] The Republicans allot two each to Puerto Rico and the Philippines, and three each to the District of Columbia, Alaska, and Hawaii, giving a bonus of two to Alaska and Hawaii if the territorial delegate is a Republican. The Democrats allot six delegates in each of these cases; and also six to the Canal Zone and two to the Virgin Islands.

[2] For a full discussion, see Louise Overacker, *The Presidential Primary* (New York, 1926).

[3] For comment on the merits and defects of presidential primaries, see p. 166.

1939 now prohibits all such persons from serving as delegates to party conventions. Delegates and alternates are grouped on the floor by states, a huge placard indicating the location of each. Each delegation is provided with a microphone, connecting with the public address system, so that any delegate who speaks from the floor can be heard throughout the hall, and indeed throughout the nation, for the proceedings are broadcast over the national radio hookups.

At the front of the hall is a great stage, on which the principal dignitaries are given seats. A temporary chairman is chosen, usually without any opposition, and proceeds to deliver from the stage a keynote speech in praise of the party's achievements. A committee is then appointed to examine the credentials of the delegates. When its report has been adopted, the convention elects a permanent chairman (who also unburdens himself of a speech) and proceeds to consider the party platform. This platform has been framed in advance by a committee appointed for the purpose. Some planks in it may give rise to debate, but as a rule the platform is adopted without much change.

Finally, on the third or fourth day, after these tedious preliminaries are over, the great item on the calendar is reached, and nominations for the office of President are announced by the chairman to be in order. The roll of states is called in alphabetical order, Alabama first and Wyoming last. The chairman of any state delegation, or someone acting for him, may make a nomination. If a state has no candidate of its own, no "favorite son" as he is called, it may yield its place in the alphabet to some other state. Thus Alabama may yield to New York and the chairman of the New York delegation will proceed to nominate his candidate in a eulogistic address. The nomination is then seconded, with further eulogy, by delegates from various states.[1] These nominations and speeches may take a whole day, or perhaps a couple of days. It is a time-consuming process because the placing of each candidate's name in nomination is the signal for a demonstration on his behalf. Led by the delegates from the state which has nominated him, a procession starts through the aisles, gathering as many adherents as it can and making as much noise as lusty lungs can produce. Sometimes these demonstrations last a half hour or more, with the galleries joining in the bedlam. Admission to these spectators' galleries, by the way, is by ticket — each candidate being given his share of the tickets, which he distributes among his supporters.

4. THE NOMINATIONS.

After all the nominations have been made, the voting begins. It is not

[1] In the Republican convention of 1940 nominating speeches were limited to thirty minutes; seconding speeches, to five. Of the ten persons nominated, half were seconded four times each.

by ballot but by a voice vote. The roll of the states is again called in alphabetical order, and the chairman of a delegation announces: "Alabama (etc.) casts its votes for So-and-So"; or he may report a divided vote, some for one candidate and some for another.[1] In both the Democratic and the Republican national conventions a majority is sufficient to nominate; but a clear majority of all the delegates is needed. Accordingly, when several candidates are in the running, with strong support, it is often necessary to take ballot after ballot before any one of them fulfills the requirement. As the polling goes on, the weaker candidates drop out; votes are shifted around on successive ballots; one roll call follows another until a decision is reached. The convention hall, in these midsummer days, becomes a sweltering cockpit and as a rule both the delegates and the spectators are thoroughly wilted before a decision is reached.

5. BALLOTING ON NOMINATIONS.

THE REPEATED ROLL CALLS.

It required thirty-six ballots to nominate Garfield at the Republican national convention of 1880. Woodrow Wilson, at the Baltimore convention of 1912, was not chosen until forty-six ballots had been taken. At the Democratic national convention of 1924, it required one hundred and three ballots to make a nomination. On the other hand, a national party convention makes its choice on the very first ballot seven times out of ten. The Republican conventions did so in 1924, 1928, 1932, and 1936; the Democratic, in 1928, 1936, 1940, and 1944.

SOME EXAMPLES.

When the presidential candidate has been chosen, the selection of the party nominee for the vice-presidency is made in the same way, but usually with less trouble and sometimes in a great hurry, for the big fight is over and the delegates are in a mood to get home. But in nominating the candidate for the vice-presidency there are roll calls, speeches, demonstrations and ballotings — all less exciting, as a rule. In some cases, however, the contest for this nomination becomes close and exciting. It is an axiom of practical politics that the vice-presidential nominee should be someone who will "balance the ticket"; that is, he should supplement the strength of the presidential nominee by being drawn from another region of the country and perhaps representing a different section of the party.

A national party convention in the United States is a unique affair. There is nothing like it anywhere else on earth. The great concourse

[1] Until 1936, the Democratic party adhered to the unit rule, under which (if the state convention applied it) the delegation cast its votes solidly for one candidate. The rule could not be applied if the delegates were elected directly from congressional districts according to state law.

with its flag-bedecked stage and walls, the crowded floor and aisles with delegates milling around, the blaring bands and loud-speakers, the galleries filled with cheering onlookers, the atmosphere electric with excitement — all this provides a spectacle not soon to be forgotten. A visitor from Mars, looking at this sweltering throng, might wonder how a great nation expects to uncover good Presidents by such turmoil methods. The answer is that it doesn't. The nominee is not usually chosen by this howling mob of perspiring delegates. They are merely behaving like whirling dervishes while the issue is being settled for them in private conference.

A GREAT SPECTACLE.

In most cases, a relatively small number of party leaders and chairmen of the delegations from the big states have the convention well in hand. Somewhere, away from the madding crowd, these moguls of the party are leaning across a table, conferring, bargaining, and deciding how whole blocks of votes shall be cast at the next balloting. Sometimes they find it a hard job, but all energies are concentrated upon it; for they know that if they fail to agree the convention may get out of patience and choose someone whom none of the leaders wants. The dickering may be prolonged; meanwhile the convention keeps up its round of balloting until the word is passed down and some candidate jumps into what looks like a decisive lead. Then the deadlock breaks; the delegates tumble over one another in their anxiety to be with the winner, and the nomination is made in a burst of enthusiasm. The nominee is duly notified and accepts informally; but his formal address of acceptance (in which he sets forth his own views on the principal issues) is usually not delivered until the second week of August. In 1932 and 1936 Franklin Roosevelt, breaking with precedent, addressed the Democratic convention immediately after he had been nominated; in 1940 he did so over the radio from Washington.

WHERE THE TRICK IS BEING TURNED.

With the framing of platforms, the naming of candidates, and the appointing of a new national committee for the next four years, the party conventions have finished their work. The next step is the nomination of presidential electors in the several states. In each state the political parties put forth their slates of electors, nominated in whatever way the state laws or party rules prescribe. These electors are usually prominent party workers, but must not be federal officeholders. In most of the states their names go on the ballot in parallel columns, and on the day set for the national election in November the voters in each state decide which group of electors shall be chosen. When the voter marks his ballot for a certain group of electors, however, he is

SECOND STEP: THE NOMINATION OF ELECTORS.

THIRD STEP: THE ELECTION OF ELECTORS.

in reality indicating his preference for one of the candidates already named by the national conventions. In some states the ballots do not bear the names of the presidential or vice-presidential candidates, but only list the electors; in others they omit the names of the electors and bear only those of the candidates. As a practical matter, it makes no difference to the voters. In either case, from the voter's point of view, the voting is just as directly for the candidates as if there were no intervening electors at all.

THE ELECTORAL VOTE AND THE POPULAR VOTE.

But the results are not necessarily the same as they would be if there were no presidential electors and the election were determined by a plurality of individual votes. The candidate who gets the most votes in the country as a whole is not certain to be elected. This is because the electors in each state are always chosen as a group.[1] The party which polls a plurality in any state gets all the presidential electors from that state, while the other party gets none. No matter how small the plurality at the polls, it suffices to elect the state's entire quota of presidential electors. At the election of 1884, for example, the Democratic plurality in New York was only 1,149, but it was sufficient to give Grover Cleveland the entire group of thirty-six presidential electors from that state, thus ensuring his election. On the other hand, a large popular majority in any one state has no additional bearing on the outcome of the election. However large it may be, it does not add any additional electors. As a matter of actual experience, however, the President-elect has usually been the choice of both the electors and the people, although there have been some exceptions, especially during the past seventy years. For example, the elections of Hayes in 1876, Harrison in 1888, and Wilson in 1912 were achieved in spite of the fact that no one of them obtained a majority, and only Wilson a plurality at the polls.

FOURTH STEP: ELECTION OF THE PRESIDENT BY THE ELECTORS.

In any event, whether a candidate obtains a popular majority or not, the election is really determined at the polls in November unless something very unusual happens, such as the failure of any candidate to get a majority of the presidential electors. Nevertheless, the Constitution requires two further steps in the choice of a President. The electors who have been chosen in each state must come to their own state capital in December and go through the motions of balloting for the candidates whom their

[1] Virtually always, although the electors may be voted for individually. There may seem to be no reason why a voter should mark his ballot for some electors in one column and some in another. Yet, in a close poll, the electoral ticket has more than once been split because of the popularity or unpopularity of individual candidates: for example, Maryland in 1904 and 1908; California in 1912; and West Virginia in 1916.

party nominated at the national convention several months before. No constitutional or legal provision prevents them from marking their ballots for someone else, but they never do. They are pledged, and they vote accordingly. Suppose, however, that one of the candidates nominated for President by the national party conventions should die during the interval between the November polling and the assembling of the electors in December. Would the electors then deem themselves entitled to make a free choice as the Constitution intended? Horace Greeley died under such circumstances in 1872. Otherwise, he would have received sixty-six votes. He did receive three, which Congress rejected, the other electors scattering their support among four persons. Nowadays this cannot occur. By a vote of the convention, the national committees of the parties are empowered to fill any vacancy in the ticket or else call a convention for the purpose.

When the electors have marked their ballots, and these ballots have been counted, a certificate from each state is immediately sent to Washington attesting the result. There, as has been said, the president of the Senate supervises the opening of the certificates in the presence of both Houses of Congress. As a rule this is a pure formality and merely discloses what everybody knew before. But it may happen that the result is a tie, or that no candidate has received a clear majority of the total electoral vote. Then the House of Representatives proceeds to choose a President from among the three candidates who have stood highest in the electoral returns. And in this balloting the members vote by states, not as individuals, a majority of the states being necessary to a choice.

FINAL STEP: TRANSMISSION AND COUNTING OF THE VOTES.

In case the electors have failed to elect a Vice-President by a clear majority, the Senate makes the choice between the two highest candidates — the senators voting as individuals and not by states. On only two occasions, the last of them more than a century ago, has the House been called upon to select a President; and on only one occasion (in 1837) has the choice of a Vice-President been decided by the Senate.

INDECISIVE ELECTIONS.

Prior to the adoption of the twentieth amendment in 1933, the President was inaugurated on March 4, four months after the November polling. This interval often proved embarrassing because an outgoing President could accomplish little during these last months, even though a critical situation might demand action. So it is now provided that the terms of the President and Vice-President shall end at noon on January 20, and the new inauguration is held on that date. Likewise the twentieth amendment stipulates that

THE TWENTIETH AMENDMENT.

if a President-elect dies before the beginning of his term, the Vice-President-elect shall become President. Or if, when the inauguration date arrives, no President has been elected or has qualified, the Vice-President-elect shall act as President until the matter is settled. This provision takes care of the possibility that an indecisive presidential election might have to be taken into the House of Representatives, and that this body, which meets on January 3, might be unable to make a choice within the seventeen days that are available before the inauguration date. Finally, the amendment gives Congress power to determine by law what shall be done in case neither a President nor a Vice-President has been elected when the 20th of January arrives.

THE INAUGURATION OF A PRESIDENT.

At his inauguration, the President takes the oath of office which is prescribed in the Constitution. Ordinarily this is administered by the Chief Justice of the United States during a public ceremony at the east front of the capitol. But when a President dies in office, and a Vice-President succeeds him, the latter takes the oath at once and in private. Thus, Calvin Coolidge was sworn in by his father, a rural justice of the peace, whom he happened to be visiting in Vermont when President Harding's sudden death occurred. No official act can be performed by the President until he has taken the oath, which is as follows: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

WHY GREAT MEN ARE SELDOM CHOSEN

LORD BRYCE ON THE PRESIDENCY.

In Lord Bryce's analysis of the spirit and workings of American government fifty-odd years ago a notable chapter was devoted to the question, "Why Great Men Are Not Chosen Presidents":

> Europeans often ask, and Americans do not always explain, how it happens that this great office, the greatest in the world, unless we except the Papacy, to which anyone can rise by his own merits, is not more frequently filled by great and striking men. . . . [Since] the heroes of the Revolution died out with Jefferson and Adams and Madison, no person except General Grant has reached the chair whose name would have been remembered had he not been President, and no President except Abraham Lincoln has displayed rare or striking qualities in the chair.[1]

If Bryce were writing today, he would change the foregoing paragraph considerably, for at least three or four Presidents with "rare or striking

[1] *The American Commonwealth*, Vol. I, chap. viii.

qualities" have occupied the White House during the past fifty years. Most Americans regard Grover Cleveland and Woodrow Wilson as "great" Presidents, even when measured with John Adams or James Madison; and there are few who would deny to either of the Roosevelts the possession of "striking" qualities. Among the thirty-two Presidents of the United States there have been nearly as many great and striking figures as one can discover among the prime ministers of England during the past hundred and fifty years, although this is a matter on which there might be difference of opinion. There have been men of small caliber in the White House at times, but Downing Street has also had its share of them.[1] The Third French Republic, during the seventy years between its inception and collapse, had an even more generous sprinkling of small-caliber prime ministers. America is not alone in permitting mediocrity to gain, at times, the highest honor in the land.

THE NATION HAS NOT ALWAYS UTILIZED ITS GREATEST MEN.

Still, the query propounded by Lord Bryce is a suggestive one and deserves discussion. The United States has failed to utilize in the presidential office a long line of outstanding statesmen: Hamilton, Marshall, Gallatin, Webster, Clay, Calhoun, Seward, Sumner, Blaine, Hay, and Root — to name only a few. On the other hand, it has bestowed its highest honor on men like Fillmore, Pierce, Arthur, and Harding, of whom no one now knows much (or cares to know) except that their names have achieved immortality on the roll of chief executives. Certain it is that the standard has not been so high as the Fathers of the Republic expected, for Hamilton in 1788 voiced the prediction that "the office of President will seldom fall to the lot of anyone who is not in an eminent degree endowed with the requisite qualifications. . . . It will not be too strong to say that there will be a constant probability of seeing the station filled by characters preeminent for ability and virtue."

SOME ILLUSTRATIONS OF THIS.

Several factors contribute to the election of Presidents who do not necessarily possess conspicuous merit.[2] In the first place, the greatest asset of a presidential candidate is "availability." A candidate has availability if his place of residence, temperament, affiliations, public record, and place in the public imagination seem likely to impress the electorate — at the moment. At the approach of an election campaign there may be many aspirants with the desired qualities; or, on the other hand,

AVAILABILITY COUNTS FOR MORE THAN PERSONAL MERIT.

[1] A full account may be found in Clive Bigham, *The Prime Ministers of Great Britain* (New York, 1922).

[2] For an interesting discussion of this topic see Harold J. Laski, *The American Presidency: An Interpretation* (New York, 1940), pp. 41 *ff.*

both political parties may be hard pressed to find anyone who comes at all near qualifying. There may be plenty of "presidential timber" or a great scarcity of it. It sometimes happens, moreover, that a man who is by common agreement the strongest possible candidate in one year may be wholly out of the running a few years later. The right candidate during an era of peace and prosperity would be the wrong candidate for a depression or an emergency. Availability and high personal competence on the part of a candidate do not necessarily go together. National nominating conventions are primarily concerned in finding candidates who will win. Whether they will display real executive competence, when called upon to do it, is not so important to party leaders whose immediate goal is to capture or retain the spoils of office.

It might be supposed, for example, that long experience in political life would be an asset to one who seeks the nomination; but usually it is not. The man who spends a long term in public office, if he has a will of his own, is certain to accumulate political enemies. By supporting some measures and opposing others, he antagonizes voters — sometimes a great many of them. It is an axiom of politics that most people vote their resentment rather than their appreciation, and for that reason a man with a long record in public office is not usually looked upon as a strong candidate. On the other hand, candidates for the presidency are not often recruited directly from private life. Of the Presidents during the past fifty years, four (Harrison, McKinley, Harding, and Truman) served in Congress before going to the White House. All the others possessed executive experience. Taft and Hoover had been in presidential cabinets; Cleveland and the two Roosevelts had served as governors of New York, Wilson as governor of New Jersey, and Coolidge as governor of Massachusetts. Experience, therefore, but not too much of it, seems to be what is required. Only once in recent years has either of the major political parties nominated a presidential candidate who, at the time of his nomination, had no experience in public office. This was the surprise nomination of Wendell L. Willkie by the Republicans in 1940.

LONG POLITICAL EXPERIENCE IS A LIABILITY RATHER THAN AN ASSET.

It is politically desirable, again, that presidential candidates shall be taken from what are called pivotal states. This results from the fact that the presidential election is not determined by the plurality of the total votes cast by the people but by a majority of the electors chosen. The successful candidate must carry enough states to control this electoral majority; hence he should be strong in those sections of the country which provide most of the presidential electors. If one will look over the presidential nominees of the two

THE INFLUENCE OF THE "PIVOTAL" STATES.

major parties during the past fifty years, it will be seen that geography, quite as much as personal qualifications, has had to do with the selection.

ITS PRACTICAL IMPORTANCE.

Seekers for the nomination are at a disadvantage if they come from very small or heavily partisan states; and most of the states are in that category. To be strictly truthful one should amend the saying that "every American boy has a chance to become President," by adding: "if he lives in one of the big, doubtful states." If he is a Republican and lives in one of the southern states, he has, statistically, no chance whatever. No Republican candidate for the presidency has come from any southern state since the Republican party was born, over eighty years ago. On the other hand, it is almost inconceivable that the Democrats, under ordinary conditions, would select their standard-bearer from a state which is so hopelessly Republican that he would have no chance of carrying it. Good political strategy dictates that the presidential candidate should be someone who is stronger than his party — who can carry states which the party would not ordinarily win. He should be able to swing one or more of the pivotal states. Is it not significant that only four Presidents during the past seventy years have come from states other than Ohio and New York?[1] And in every presidential election since the Civil War at least one of the major candidates has come from the same two commonwealths.

TYPES OF CANDIDATES: 1. "LOGICAL CANDIDATES."

It has been customary to say that there are always three classes of aspirants for the presidential nomination: namely, "logical candidates," "favorite sons," and "dark horses." The logical candidates get into the running early, sometimes a year or two before the election. On paper they appear to have the elements of strength; they draw support from various parts of the country and sometimes manage to pledge a considerable fraction of the delegates before the convention meets. A President who is serving his first term is always regarded as a logical candidate for a second term. It is only with great difficulty that anyone else can take the nomination away from him, and it has not been done in either party during the past fifty years.

2. "FAVORITE SONS."

Favorite sons are candidates brought forward by their own states even though they may have very little strength outside. There is always a hope that other states, particularly in the same region, may lend a hand. At any rate there are favorite sons aplenty in the early stages of every presidential campaign. Sometimes the favorite son is merely a stalking-horse, brought forth as a means of retain-

[1] These were Wilson of New Jersey, Coolidge of Massachusetts, Hoover of California, and Truman of Missouri.

ing freedom of action for the party in his own state. The local delegation pledges its support to him as a means of warding off any attempt to capture it for someone else. Then, at the convention, its strength can be used for trading purposes; it can be turned over en bloc to some candidate who has a chance of winning the nomination. Sometimes, however, the favorite son is a real candidate and stays in the balloting to the end.

Finally, there are the dark horses who trot into the political paddock and are what bookmakers would call a "long shot." These ebony equines are not always avowed candidates, but it goes without saying that they are keenly receptive. Their chief hope lies in the possibility of a deadlock. With two or three strong candidates in the field, there is always a chance that the convention will take ballot after ballot without giving anyone the requisite majority. Then, as the delegates grow weary and discouraged, dark horses are brought forward in the name of compromise. Or, the improbability of any leading candidate's obtaining a majority may become apparent after only two or three ballots have been taken. The convention may then turn to a dark horse without further delay.

3. "DARK HORSES."

Its action in doing so may be expedited by pressure placed upon the delegates by people back home. For those who go to represent their party at a national convention, even though they may be officially unpledged, are usually deluged with telegrams and long-distance telephone messages from friends and supporters who urgently advise them what to do on the next ballot. The nomination of Wendell L. Willkie by the Republican convention in 1940 afforded a striking example of the way in which telegraphic pressure from the rank and file of the party, all over the nation, can sometimes impel a convention to do what it is not itself much minded to do.

EXTERNAL PRESSURE.

It would be difficult to make a list of all the considerations which influence the action of a national convention in making its presidential nomination. A man's age, family background, place of residence and experience, his religion, his leanings to liberalism or conservatism, his economic affiliations past and present, his acceptability to the business interests or to the labor organizations, his past services to the party, his attitude on specific current issues, his skill as a vote getter if he has demonstrated it, and the general impression of himself which he has stamped upon the public mind — all these things weigh in the selection. Yet none of them is closely related to the possession of great intellectual capacity or administrative skill. It is the business of a national convention to nominate a good candidate rather than to see that the country gets a good President. Hence the

PERSONAL FACTORS IN THE CHOICE.

ablest statesman in the land may be regarded as inferior, in point of political availability, to some amiable compromiser from a pivotal state. To answer Lord Bryce's question one might say that great men are not always elected to the presidency because great men do not necessarily make strong candidates. The party's objective is a great victory, not a great President.

THE TIME OF THE ELECTION.

The policy of rigidly fixing the date on which a presidential election must take place has also had its effect. Under the parliamentary system of government, a general election must occur once in every so many years, but within this time limit an administration can "go to the country" whenever it pleases. It can avoid a time when public opinion seems to be running adversely and can choose a moment when some popular stroke operates heavily in its favor. But in the United States a President cannot seek a reelection whenever a propitious juncture appears. He must wait till the constitutional date arrives. Hence the party leaders, in choosing the candidates, must have regard to the public temper of the moment. If everything is going prosperously, the "safe and sane" type of candidate has an advantage. But if the date for an election looms into view with the country in a depressed and disillusioned frame of mind, then the advantage passes to someone who can impress the people with his ability to provide remedial leadership and give the country a new deal. That was the case in 1932. There are fair-weather candidates and there are those to whom the voters turn when the skies are darkened.

UPS AND DOWNS OF THE PRESIDENCY.

Yet the American presidency, when all is said, has maintained an amazingly good average of ability and statesmanship, save for a lapse at one period. It has been "one thing at one time, another at another, varying with the man who occupied the office and with the circumstances that surrounded him." [1] During the first forty years of its existence — that is, from Washington to Jackson — the standard was high. Then it began to slip, and it kept slipping until the election of Lincoln in 1860. Since the Civil War there have been big and little men in the White House, and some who fall in neither classification. Cleveland was a great President, by whatever standard judged; Theodore Roosevelt was a striking one; and Wilson's place in history is assured by reason of the epoch-marking events from which his name can never be dissociated. As for the Presidents who have been in office during more recent years, their claims to greatness are as yet controversial — and a textbook is no place for political controversy.

Looking into the future, there is nothing to indicate the likelihood of a

[1] Woodrow Wilson, *Constitutional Government in the United States* (New York, 1911), p. 57.

decided change for better or for worse. Some years ago, when the presidential primaries began to be used in a number of the states, it was predicted that the new method of choosing convention delegates would quickly put an end to those maneuvers and deals at national conventions which had occasionally resulted in sending second-rate men to the executive mansion. That prediction has not been fulfilled. The plan of asking the voters to express their preferences at the polls, and of pledging the delegates in accordance with such preferences, does not afford much protection against political trading when the national party conventions assemble.

WHAT OF THE FUTURE?

The reason is that delegates cannot be sent to a national convention with definite instructions covering all eventualities. Situations will arise in which they must be free to act in accordance with their own judgment. The candidate to whom they are pledged may withdraw from the race, or his prospect of getting the nomination may become hopeless. Then the delegation must be free to use its discretion in supporting someone else. It is in the process of making this shift that the opportunity for trading arises. The candidate who will promise the most is the one who may have the best chance of capturing the loose delegations. The fundamental difficulty with the presidential primary is that the choice of a presidential candidate is not usually a matter of selecting one from two, but one from a dozen.

WILL PRESIDENTIAL PRIMARIES HELP?

The presidential primary has been impaired in effectiveness because various states hold their primaries at different dates. The results in one state naturally influence the others. Not all the candidates who hope to have their names presented at the convention, moreover, are willing to enter the primaries. In states where they fear that they may be losers, the stronger ones deem it good strategy to stay out. In theory the presidential primary gives every voter the opportunity to choose between the leading contenders for the party nomination; in practice it rarely succeeds in doing so. More often it bids them choose between a favorite son and a forlorn hope, neither of whom has much chance of figuring in the final convention ballot. In general, therefore, the presidential primary system has been something of a disappointment.

SOME OF ITS DEFECTS.

The remuneration of the President is fixed by Congress, but it may not be either increased or diminished during the term for which he was elected. At present it is $75,000 per annum. In addition, various appropriations for secretaries, clerks, traveling expenses, the care and maintenance of the White House,

SALARY AND ALLOWANCES.

et cetera, are annually made, amounting to about three hundred thousand dollars. Even this, however, is not a large amount when compared with the cost of maintaining the chief executive office in European countries.

PRESIDENTIAL IMMUNITIES.

The President has certain constitutional immunities. He may not be haled into any regular court either as witness or defendant. At the trial of Aaron Burr, the Supreme Court issued a summons to President Jefferson who declined to obey it on the ground that the court had no such power. "Would the executive be independent of the judiciary," asked the President, "if he were subject to the commands of the latter, and to imprisonment for disobedience?"[1] The court eventually accepted the principle for which Jefferson contended and agreed that the President, in the exercise of his constitutional powers, is beyond the reach of any other department.[2] The only tribunal before which the President can be brought is the United States Senate, sitting as a court of impeachment, as will be later explained.[3] He may nevertheless waive his immunity and appear as a witness in one of the regular courts if he sees fit. On one occasion President Grant did this.

THE VICE-PRESIDENCY

THE VICE-PRESIDENCY.

The framers of the Constitution made provision for a Vice-President, although one of them remarked in the course of the debates that such an official was not wanted and that the position was merely being established as a consolation prize inasmuch as it was to be bestowed upon the candidate getting the second-highest vote from the electors. Benjamin Franklin, in one of his whimsical moods, suggested that the Vice-President should be addressed as "His Superfluous Highness." If Congress had been given power to choose the President, as was the original plan, there would have been no need for a Vice-President; for in the event of a vacancy the national legislature would choose a new President without delay. But when the method of electing the President through the medium of electors was decided upon, it became apparent that, in the event of the President's death, resignation, or removal, it would be undesirable to have the presidential office left vacant until new electors could be chosen and could act.

So, the vice-presidency was established to meet such contingencies. Its incumbent is elected in the same way and for the same term as the President. "In case of the removal of the President from office," says

[1] *Jefferson's Writings*, edited by Paul Leicester Ford (12 vols., New York, 1904–1905), Vol. IX, pp. 59–60.

[2] Kendall *v.* United States, 12 Peters, 524 (1838).

[3] See pp. 299–300.

the Constitution, "or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve upon the Vice-President."[1] It will be noticed that this wording does not give the Vice-President any right to assume the *title* of President. It merely provides that the powers and duties of the presidential office shall devolve upon him. But John Tyler, the first Vice-President to fill a vacancy, took the title as well as the powers, and his example has since been followed.

OFFICE AND TITLE.

On seven occasions since 1789, the death of a President has elevated the Vice-President in accordance with this provision of the Constitution. No President has resigned or been removed by impeachment, and in no case has the succession come because of "inability to discharge the powers and duties" of the office; although President Garfield was for more than two months in 1881 physically unable to perform any important official act, and President Wilson was similarly incapacitated for a considerable length of time during the latter part of his second term.[2] Both these cases led to some discussion as to just how much "inability" there would have to be before the Vice-President could step in and assume the presidential powers. And whose function is it to declare that a President, by reason of a physical or mental illness, is no longer able to discharge the powers and duties of his office? Neither the Constitution nor the laws give answer to that question. Presumably, it would be in order for the Vice-President (in response to a joint resolution of Congress) to issue a proclamation, countersigned by the secretary of state, announcing that by reason of the President's inability to discharge the powers and duties of his office, the same had devolved upon the Vice-President. Then, if the fact of inability were questioned, the courts would decide it.

SOME MOOT QUESTIONS CONCERNING IT.

In case the Vice-President is for any reason not available to succeed the President, the Constitution gives Congress the right to determine the order of succession, and Congress has so provided by the Presidential Succession Act of 1886, naming the various then-existing cabinet officers according to the seniority of their posts: the secretary of state, the secretary of the treasury, secretary of war, attorney general, postmaster general, secretary of the navy and secretary of the interior. But no one of these officials may succeed to the presidency unless he is a natural-born citizen and otherwise eligible. When a vacancy occurs in the office of Vice-President, it is not filled

THE SUCCESSION LAW OF 1886.

[1] Article II, Section 1.

[2] Absence from the United States, even for months at a time, does not constitute "inability to discharge the duties" of the presidency — as President Wilson demonstrated during his absence in France during the negotiations for a peace treaty in 1918–1919.

till the next election. During the interval the secretary of state stands as the heir apparent. But thus far the succession has never passed beyond the Vice-President.

POSITION AND DUTIES OF THE VICE-PRESIDENT.

A few words, but only a few, should be added with reference to the position and duties of the vice-presidency. The framers of the Constitution intended the office to be a dignified one and a sort of preparatory school for the chief executive position. They expected its incumbent to be a man second only to the President in the favor of the electors and in line for the higher post at the next election. During the first few decades, this view of the office persisted; but with the practice of nominating the candidates at national conventions it was gradually lost to view. Thereupon the vice-presidential nomination came to be used as a means of strengthening the party ticket. It is still so used. It serves, as a rule, to balance the ticket geographically or goes to someone who can placate a disgruntled or disappointed faction of the party, or bring some doubtful state into line, or secure large contributions to the party's campaign funds. The personal merits and capacity of the candidate have not been the controlling factors during the past hundred years; nevertheless, some men of marked ability have found themselves installed in this office.

PRESIDING OFFICER OF THE SENATE.

When the Constitution was being framed, one of the delegates suggested that the Vice-President should be given something to do besides waiting to fill another man's shoes. So they made him presiding officer of the Senate. But he is an outsider there, has no vote except in case of a tie, appoints no committees, and has nothing more than perfunctory powers. Theodore Roosevelt, when he held the post of Vice-President, referred to it as "an office unique in its functions, or rather in its lack of functions." During the Harding administration (1921–1923) Vice-President Coolidge was invited to attend meetings of the cabinet and regularly did so. But Vice-President Dawes, during the Coolidge administration, declined a similar invitation, and the practice since then has varied.[1]

THE CONSTITUTIONAL QUALIFICATIONS.

No one is eligible to the presidency either by election or by succession unless he is a natural-born citizen, thirty-five years of age or more, and unless he has been a resident of the United States for at least fourteen years. A special exemption as to natural-born citizenship was made in the Constitution for those who were citizens at the time of its adoption. This was done as a matter of courtesy to Alexander Hamilton, James Wilson, and others, who,

[1] In 1945 President Truman invited to cabinet meetings Senator McKellar, then serving as president pro tempore of the Senate.

although not born in the territory which formed the Union, had taken a considerable share in establishing the new government.

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CHAPTER XI

THE PRESIDENT IN RELATION TO CONGRESS

> By mutual confidence and mutual aid,
> Great deeds are done and great discoveries made.
> — *Pope.*

The President of the United States is more than a chief executive. As has been pointed out, he is expressly given the duty of recommending measures to Congress, and by implication he may take any means that he deems necessary or proper to see that his recommended measures get before Congress in an effective way. Washington and John Adams carried their recommendations to Congress in person; but Jefferson began the practice of sending written messages to be read in both Houses by the clerks, and this plan was consistently followed until 1913, when President Wilson reverted to the earlier method. His successors have used both procedures, sometimes sending written communications and sometimes addressing Congress orally. A presidential message naturally makes a stronger impression on Congress when it is delivered in person, especially if the President is a forceful speaker and uses the radio to carry his words to the ears of the whole country. But whether written or spoken, these expressions of presidential opinion may come at any time and may deal with any subject. At the beginning of each congressional session there is usually a long message which deals with a variety of matters; while special messages dealing with particular subjects are transmitted whenever the President sees fit to send them.

THE PRESIDENT'S MESSAGES.

Presidential messages to Congress may have any one of three purposes in view — or sometimes all three purposes combined. First, the message may be merely intended to suggest that there is need for certain legislation and that Congress should consider the desirability of providing it. In such cases a bill will be introduced, along the lines of the President's recommendation, usually by prearrangement with some member of the Senate or the House. Sometimes the measure is drafted and in readiness before the message comes. At any rate it is referred to the appropriate

WHAT THEY AIM TO DO: (a) INFLUENCE CONGRESS.

committee, and from that point will follow the customary legislative procedure, except that by action of either chamber it may be given a certain priority on its calendar. But whether it will eventually become a law depends on many factors, such as the amount of influence the President exerts in its behalf, the merits of the bill, and the political complexion of Congress.

Second, the President's message may not be primarily intended for the ears of Congress, although officially addressed to that body; its real destination is the ears of the whole country. It may be, and sometimes is, intended to rouse public interest all over the land, to get people stirred up and provoke a bombardment of letters and telegrams upon congressmen from their friends back home. It is a way that the President has of "going to the country," and rallying it to his support. In recent years, the President has used this procedure on numerous occasions. Although in form a message to Congress, the presidential deliverance has been in fact a sermon to the American people from the biggest pulpit in the country. Every presidential message, no matter what its purport, is virtually certain to get newspaper headlines. If it relates to a matter of importance it is printed in full by newspapers everywhere. If it deals with a question of foreign relations, it is likely to be published by newspapers in other countries. No one can compete with the President when it comes to assuring himself of a wide public hearing.

(b) INFLUENCE THE PUBLIC MIND.

It is true that in his appeals to the public attention, both at home and abroad, the President does not confine himself to congressional messages. He may, and often does, prefer the method of speaking to the people direct. The radio gives him this opportunity whenever he wants it. A series of "fireside chats," addressed to the whole people over the nation-wide broadcasting chains, was a feature of President Franklin D. Roosevelt's first term. Quite as influential upon Congress as official messages were these informal talks on issues of the hour, which went to an audience of many million voters. Addresses on a variety of public occasions (such as the dedication of new public buildings) are also made by the President; and these, by way of the ether, give the chief executive a means of intimating to Congress how urgently the President desires one thing or another. Such addresses also serve at times as "trial balloons" — in other words, as the means of making tentative proposals of legislation to see how the country will react. By carefully noting the public reaction to his words, the President is able to sense the drift of popular sentiment more accurately than Congress can do it.

DIRECT PUBLIC APPEALS.

Third, a presidential message may be primarily intended for foreign consumption, not for home use. Its principal purpose may be to inform some one or more foreign powers concerning the attitude of the United States on some phase of international policy. One of the most conspicuous landmarks in the history of American foreign policy, the Monroe Doctrine, was established by a presidential message transmitted to Congress in 1823. President Cleveland's message to Congress on the Venezuela boundary dispute in 1895 was designed to bring the government and people of Great Britain to a realization of the fact that the United States meant business in this matter. During the years immediately preceding the entry of the United States into World War I (1917), some of President Wilson's messages to Congress were clearly motivated by a desire to let European Powers understand the attitude of the United States towards certain features of the great struggle. And more than one of President Roosevelt's messages during the years 1941–1945 had the same end in view. The President is the country's official spokesman on matters of foreign policy, but, inasmuch as the support of Congress is needed to make presidential declarations of policy effective, it is appropriate that such pronouncements be made in the form of messages to the national legislature.

(c) INFLUENCE FOREIGN COUNTRIES.

There are times, however, when in spite of presidential urgings the Senate, or the House, or both, remain indisposed to do what the chief executive asks. This occasionally happens, even when his own party controls a majority in both chambers of Congress. Party lines are often broken down when issues of foreign policy or of economic reorganization come up. Regional or class interests quite frequently determine the alignment. When the President's recommendations fail to gain congressional endorsement, he has other means of bringing pressure to bear upon the recalcitrant legislators. One way is to appeal unto Caesar — that is, to make a bid for popular support as has just been explained. Another way, not so visible to the naked eye, is to withhold all patronage from congressmen who do not play the game. Those senators and representatives who belong to the same political party as the President are definitely interested in things that the administration can give — contracts and appointments for their own friends and supporters, allocations of public money for projects in their home states and districts — in a word, patronage of all kinds. The President can easily drop a hint to the heads of departments that congressmen who show themselves rebellious are not to be given recognition when the loaves and fishes are being doled out. It is not necessary to refuse what these legislators ask. The end can

DIRECT PRESIDENTIAL PRESSURE ON CONGRESS.

usually be achieved by merely delaying action on their requests until they begin to see the light.

THE "PRESIDENTIAL LOBBY."

Thus the President's relation to Congress, if he chooses to make it so, can be a very influential one along affirmative lines. He can initiate, promote, and under favorable conditions virtually assure the enactment of legislation. Through his higher subordinates, the heads of departments and bureaus, as well as the members of numerous administrative boards, he has at his command the most powerful lobby in Washington. These officials can gather facts and data wherewith to demonstrate, in hearings before the congressional committees, the urgent need for such legislation as the President recommends. Opponents of the measures have no such far-reaching facilities. Nevertheless, in spite of all these advantages, it is not possible for the President to count with certainty upon the approval of his recommendations by Congress. Even under the most favorable circumstances it is a long journey from the introduction of a bill to its final enactment, and there are numberless pitfalls along the road.

THE VETO POWER

Equally as important as the President's positive influence upon the lawmaking work of Congress, and much more definite, is his potential influence in a negative sense — in stopping legislation to which he is opposed. This comes to him through his veto power as provided in the Constitution. The scope and nature of this authority cannot be more succinctly expressed than by quoting the words of the Constitution itself:

> Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.[1]

[1] Article I, Section 7.

How did the framers of the Constitution come to adopt this provision, which is a native-born American contribution to the practice of government? They devised it in accordance with their policy of choosing a middle course between two extremes. On the one hand, they were not prepared to give the President an absolute veto such as governors had possessed in colonial days. On the other hand, they did not think it proper that the laws should be made in sheer defiance of the President's rights or wishes. Experience with parliament in colonial days had shown that a legislature could be quite as tyrannical as a monarch. All the lessons of history, in fact, seemed to demonstrate that no legislative body could be kept within its own sphere of action by any "mere parchment delineation of boundaries."[1] The executive ought, therefore, to be given some sort of weapon to wield in its own defense, and the "qualified veto" was devised as a compromise between an absolute veto and no veto at all. It was agreed upon as establishing what Alexander Hamilton termed "a salutary check upon the legislative body," and at the same time a "shield to the executive." Apparently the framers of the Constitution looked upon the President's veto as a legislative rather than as an executive function; for they inserted it in that part of the Constitution which relates to the organization and powers of Congress.[2]

THE QUALIFIED VETO IS A COMPROMISE.

If you read carefully the veto clause of the Constitution, as previously quoted, you will see that any one of four things may happen when a bill or joint resolution of Congress reaches the presidential desk. First, the President may promptly sign it. That is what he does in the great majority of cases. Second, he may return it unsigned, within the space of ten days, to the branch of Congress in which it originated. The Constitution requires that in returning it he shall state his objections, but these need not be specific. A mere statement that the measure is unwise or untimely or extravagant is enough. At any rate, when the measure comes back to Congress, it is again voted upon; and, if adopted in each House by at least a two-thirds majority, it becomes a law notwithstanding the President's disapproval. In popular parlance it is "passed over his veto." Third, the President may neither sign the measure nor return it. He may let it lie on his desk until the ten-day limit has expired. Thereupon the bill becomes a law without his signature unless Congress has meanwhile adjourned. In that

THE THREE COURSES OPEN TO A PRESIDENT.

[1] *The Federalist*, No. 73.

[2] "It has been suggested by some that the veto power is executive. I do not quite see how. . . . The character of the veto power is purely legislative." W. H. Taft, *Our Chief Magistrate and His Powers* (New York, 1916), p. 14.

case (and this is the fourth eventuality), it does not become a law. It gets what is commonly known as "the pocket veto."

THE VETO PROCEDURE IN PRACTICE.

A few words of explanation should be added with reference to these several methods of settling the fate of bills which come to the President's desk. The ten days do not include Sundays, nor does the time begin to run until the bill actually reaches the President. When President Wilson was in France, attending the Peace Conference at the close of the First World War, the bills did not reach him, in some instances, for more than ten days after they had passed both Houses. The same was also true of some bills sent to President Franklin D. Roosevelt during his absences on trips to European conferences during the Second World War. As a rule, the President quickly signs those bills which he approves and vetoes those which he disapproves; but if his mind is not strongly set in either direction he may ignore the measure altogether. In this way, when ten days expire, he throws the whole responsibility upon Congress by letting the bill become a law without his signature.

When a congressional session is nearing its end, however, the President's failure to sign a measure is equivalent to an absolute veto. Many bills meet this fate to the great disappointment of their sponsors. The reason is that numerous measures drag their way along the congressional calendar until the closing days of the session and are then rushed through their final stages — sometimes under suspension of the rules, or more often by unanimous consent. The President gets them in batches on the eve of adjournment and naturally finds it impossible to give each bill the consideration it deserves. So he picks out the ones which he approves and leaves the rest to die a natural death on his mahogany table while the congressmen are scurrying to their homes.

But this should not be construed to mean that the President, if he decides to sign a bill, must do it before Congress adjourns. He has ten days after its presentation to him, no matter what Congress does in the meantime. President Wilson, acting upon an opinion of the attorney general, signed a number of bills after the adjournment of Congress in 1920; and the Supreme Court has ruled that such action is within the President's power.[1] In still another way the President can gain time in which to consider what he should do. Bills do not go to him, after passing both Houses, until they have been signed by both presiding officers. So, if the President is playing for time, he can sometimes arrange with one

[1] Edwards *v.* U. S., 286 U. S. 482 (1932). For a full discussion, see the article by Lindsay Rogers on "The Power of the President to Sign Bills After Congress Has Adjourned" in the *Yale Law Journal*, Vol. XXX, pp. 1 *ff.* (1920). More than thirty years earlier the court had ruled that the President might sign bills during a recess of Congress.

of these presiding officers to delay his signature and thus expand the interval between actual passage and the deadline for the President's decision. In one instance, in 1936, President Roosevelt signed a measure more than three weeks after Congress had adjourned.

VETO POWER DOES NOT APPLY TO PROPOSED CONSTITUTIONAL AMENDMENTS.

It ought to be mentioned that proposed amendments to the Constitution, when they have passed Congress by a two-thirds vote in both Houses, are not presented to the President for his signature and hence cannot be vetoed by him. The same is true of concurrent resolutions which, when passed by both Houses, do not usually have the force of law, but for the most part are mere expressions of congressional opinion.[1] Joint resolutions, however, are in a different category and come within the scope of the veto provision.

EXTENT TO WHICH THE VETO POWER HAS BEEN USED.

Was it intended that the veto power of the President should be used freely or only on rare occasions? Alexander Hamilton predicted that it would "generally be employed with great caution," and for a time he seemed to be right. Washington, Adams, Jefferson, and Madison used their veto power sparingly. During the first forty years of the Republic, only nine bills were vetoed; and in every case the veto was based upon the alleged unconstitutionality of the measure or some other inherent defect, not upon the President's personal objection to it. Not one of these bills, moreover, was passed over the President's veto.

JACKSON AND JOHNSON.

But Andrew Jackson set a new record in this as in several other things by vetoing twelve bills, which was about as many as all his predecessors put together. This was because he interpreted the veto power in a way quite different from the others. Their attitude had been one of non-interference with the law-making authority of Congress except when intervention seemed necessary to prevent an unconstitutional or unworkable law from going on the statute book. Jackson took a more aggressive stand, and used the veto to stay the hand of Congress when its action ran counter to his own political or personal views. This was bitterly criticized as an usurpation; although the Constitution reads "if he approve he shall sign it, but if not he shall return it," and these words are surely broad enough. At any rate, the Jacksonian point of view eventually gained acceptance. From Jackson's time until after the Civil War, however, vetoes did not materially increase, even though the President sometimes had a refractory Congress

[1] This practice exists in spite of the constitutional requirement that (like bills) *every* order, resolution, or vote requiring the concurrence of the two Houses is subject to the veto. In fact, concurrent resolutions are sometimes legislative in nature, as when they bring into force or suspend the operation of a statute or some provision in it.

on his hands. But in the period immediately following the Civil War the quarrels between Andrew Johnson and his Congress impelled the President to swing the ax right and left, although not to much avail because Congress regularly passed its measures over his veto.

During the past three quarters of a century, the executive veto has been used freely by some Presidents and almost not at all by others.[1]

RECENT HISTORY OF THE VETO.

A great deal depends upon whether there is a congressional majority opposed to the administration. In that case, Congress is likely to pass bills which the President does not approve and which consequently are sent back without his signature. Congress, moreover, sometimes responds to the insistence of organized pressure groups by passing bills which it expects the President to veto, thus shifting to his shoulders whatever resentment may be aroused. In any event, all recent chief executives have assumed the right to veto any measure that they regard as unwise or inexpedient; they have not restricted themselves to those that seemed to be unconstitutional or unworkable. What was intended, therefore, as a weapon of executive self-defense has developed into a means of guiding and directing the lawmaking authority of the nation. It has been expanded into a general revising power, applicable to all measures of whatever sort. Enabling each President to set up his own judgment against that of the legislators, it has developed the presidency into something like a third chamber of Congress, thus making the chief executive a more active figure in legislation than he was originally intended to be.[2]

Students of government sometimes ask themselves whether the presidential veto has, on the whole, served a good purpose. Hamilton's prediction that vetoes would be relatively few has not been fulfilled; yet if one counts only those measures which are of general interest (disregarding private pension bills and the like), the vetoes probably do not average more than two or three per year. Ninety-nine per cent of all the important measures passed by Congress have obtained the presidential signature without delay or evasion. This indicates that the veto power, far from being used ruthlessly, except by two or three Presidents, has been exercised with great restraint. Public opinion, moreover, has frequently sided with the President in the use of the veto and has compelled Congress to back

MERITS AND DEFECTS OF THE VETO SYSTEM.

[1] Down to the close of 1941, a total of 1,663 measures have been vetoed, Cleveland having been responsible for 584 (mostly private bills), and F. D. Roosevelt for 533. See George C. Robinson, "The Veto Record of Franklin D. Roosevelt," *American Political Science Review*, XXXVI, pp. 75–78 (1942).

[2] E. C. Mason, *The Veto Power* (Boston, 1890), gives a full account of the use and abuse of the veto power during the first century of its history.

down. That explains why congressmen who have voted for a measure sometimes change their votes when the attempt is made to pass the same measure over the President's veto. On somewhat infrequent occasions it is possible to get the two-thirds majority in both the Senate and the House which is required to vault the executive hurdle, but at best this is a rather difficult thing to do. In the case of public bills which the President has returned to Congress with a veto message, his action has been sustained at least five times out of six. Thus it comes to pass that what was intended to be a qualified veto has become under most circumstances an almost absolute one.

VETO POWER DOES NOT EXTEND TO ITEMS IN A MEASURE.

One improvement in the American veto system has been strongly urged: namely, that the President be allowed to strike out individual items in an appropriation bill. This power he does not now possess. He must veto the bill as a whole or leave it as it stands. In consequence, he must sometimes give his assent to projects of expenditure which he does not approve; otherwise the entire appropriation bill would fail. Such bills often include hundreds of items, most of which are worthy of approval. Slipped into almost every appropriation bill, however, are a few wasteful items, the result of some congressman's energetic efforts on behalf of his own district; and the President would often eliminate these if he could. But under the present rule he cannot; he must take the chaff with the wheat. Otherwise he would be left without funds to carry on some important branch of governmental activity.

OR TO "RIDERS."

Even more objectionable are the "riders" which, like hitch-hikers, have climbed aboard some of these bills on their journey through the halls of Congress. A rider is some provision, irrelevant to the bill itself, which has been fastened on as a means of giving the provision momentum. For example, if Congress is favorably disposed towards some restriction which the President would certainly veto if it went through in a separate bill, it can tack the provision to an appropriation measure, thus giving the President no alternative except to swallow the restriction or reject the entire bill. Thus, in a measure providing money for the erection of public buildings, the President may find a stipulation that daylight saving shall be abolished in the District of Columbia or that the working hours of postal clerks shall be reduced. Nothing is too extraneous to qualify as a rider. The practice continues in spite of the fact that the rules of both Houses forbid it.[1]

Many wasteful expenditures have gone past the most vigilant Presi-

[1] House rule XXI, Section 2; Senate rule XVI, Section 4.

dents by reason of this inability to veto individual provisions in any bill which Congress has passed. A constitutional amendment would be necessary to confer this power, and it would doubtless serve a good purpose. But one should not overlook the fact that such an extension of the veto power would increase the influence of the President, giving him a new source of patronage equal to that which he now possesses through the exercise of his appointing power. This is because every senator and representative is profoundly interested in securing appropriations for use in his own state or district.[1] He is, in fact, more interested in this than in almost anything else on the congressional calendars. His support for a general appropriation measure is sometimes predicated on the fact that it contains, among its various items, a proposed expenditure for a new federal building in his home town, or a government aviation field in his district, or something else that his constituents will appreciate.

SHOULD IT BE MADE TO DO SO?

So, it can readily be seen that this right to veto individual items, if placed in the hands of a vindictive President, might be effectively used to penalize his opponents and reward his supporters in Congress. At any rate it could not do otherwise than open up a new channel of executive influence upon legislation. That has been the result in those states which have placed in the governor's hands the authority to veto individual items of proposed expenditure.

The President's influence upon lawmaking is exerted not only by actually using his veto power, but by threatening to use it. When a measure is in its earlier stages, even before it has been reported to Congress by a committee, he can make his disapproval known. This he may do openly, by a public announcement, or he may prefer to speak his mind privately to the leaders of his party in Congress. A good deal of the enthusiasm for a bill is bound to evaporate when its supporters realize that the measure is going to encounter a veto, and that its only chance of ultimate enactment lies in the faint possibility of rounding up a two-thirds majority in both chambers of Congress. Legislators do not care to spend their energies on bills which have virtually no hope of getting a place on the statute book.

CONGRESSIONAL CONTROL OF THE PRESIDENT

The chief executive, as has been shown, has various constitutional powers which he can bring to bear upon Congress as a means of influencing its work of lawmaking. On the other hand, Congress has derived

[1] The evils resulting from this situation have been considerably reduced by the national budget system. See pp. 385–391.

from the Constitution and the laws some means of controlling the actions and policies of the chief executive. Of paramount importance in this connection is the fact that the executive branch of the government can do little or nothing without spending money — and not a nickel of public money can be spent until after Congress has appropriated it.[1] This power of the purse gives Congress the whip hand. It can curtail any administrative activity by reducing the appropriations. It can make detailed regulations as to how public money may be spent. It can impose new duties upon the President or upon any of his subordinates. It can even provide that duties which it imposes upon these subordinates shall be performed in a designated way. Congress may call for information from any administrative department at any time and on any subject. It can appoint committees to investigate matters in any branch of the administrative service; these committees may be given power to summon witnesses, take testimony under oath, and make their findings public. While they have no authority to require that the President shall remove any subordinate whose work has been found open to serious criticism, these investigating committees have on more than one occasion virtually brought about such removals by reason of their disclosures.

THE OTHER SIDE OF THE SHIELD.

From time to time, one encounters the complaint that Congress does not have sufficient control over the policies of the nation because the President can virtually commit the country to various actions without congressional assent. Only Congress can declare war, for example; but the President can bring about a situation in which Congress has no alternative but to adopt such a declaration. Only Congress can appropriate money; but there are circumstances in which, as the result of executive action, the legislators have no option save to provide the funds. If the President, to take an illustration, orders the fleet to a far-off base, Congress cannot well refuse such funds as are needed to bring it home. Generally speaking, it is true that Congress is at the President's mercy in such matters, but there would seem to be no way of preventing this without placing a curb on the constitutional powers of the chief executive and thus impairing the nation's ability to meet critical situations.

IS CONGRESSIONAL CONTROL ADEQUATE?

POWERS AS A PARTY LEADER

The foregoing relations between the President and Congress are established by the Constitution and the laws of the United States. But there

[1] The Constitution is explicit on this point. "No money shall be drawn from the Treasury but in consequence of appropriations made by law . . ." (Art. I, Section 9).

is another channel of relationship, and a very important although unofficial one, which has been opened to the President by the fact that he is the leader in chief of his political party. Constitution and laws take no cognizance of the real power which the chief executive derives from this source; but by students of practical politics it is not to be minimized. The President is a party man, elected as such. The leaders of his party must work in reasonable harmony with their chief; otherwise a common front cannot be maintained, and the party is likely to go down to defeat at the next election. Nothing saps the strength of a political party like internal dissension. Whenever there are signs of it, the opposing party jumps in and tries to widen the gap. Both the President and the leaders of his party in Congress realize that differences between them must be kept from developing into an open quarrel, even if it involves concessions on both sides. But in the making of such compromises it is inevitable, from the nature of things, that the President usually gets the better of the bargain. His is a single mind pitted against several.

THE PRESIDENT'S UNOFFICIAL INFLUENCE.

The White House, one must never forget, is the biggest pulpit in the country. Millions of plain people look to it for guidance on the great public issues. They want the President to tell them what he thinks they ought to think. These millions of citizens do not care overmuch about the sacred principle of checks and balances. They do not look upon their government as an affair of watertight compartments. They remember only that they voted for a presidential candidate at the last election in the expectation that he would carry out a certain program, and they want to know whether he is doing it. When the President tells them that he is doing his best and that the whole responsibility for a nonfulfillment of his pledges should rest upon Congress, he is likely to be widely believed. Any congressman will tell you about the hundreds of letters and telegrams that come to his desk, after every presidential broadcast, from people who have not waited to hear both sides of the issue.

WHAT THE PUBLIC WANTS.

From the nature of things the opportunity for executive leadership expands greatly in times of national emergency. There have been three great occasions in American history when such an opportunity has presented itself, and in each case it has been utilized. President Lincoln, during the critical stages of the Civil War, assumed a measure of broad leadership in legislation which no chief executive of the nation had exercised prior to his time. President Wilson, when the United States entered the European War (1917), declared an adjournment of partisan politics and summoned

HOW AN EMERGENCY EXALTS THE EXECUTIVE.

the entire nation to a unified effort under his leadership. The country responded willingly, and the President found himself exercising a measure of executive authority far exceeding that given to Abraham Lincoln. Finally, in the great economic depression of the 1930's, Franklin Roosevelt radically upset the normal balance of executive and legislative power by demanding and receiving from Congress a range of discretionary authority far beyond that which had ever been given to any of his predecessors in the White House. Then, before the economic readjustments in the United States had been completed, a new emergency arose as the result of dangers to the national security and the country's participation in the Second World War, whereupon additional powers were obtained. Such emergency powers, conferred by Congress, are within the authority of Congress to revoke when the emergency is past; and American experience demonstrates that most of them are withdrawn; but some of them obtain a firm footing and remain. Every national emergency results, therefore, in some permanent additions to presidential authority.

The instinct of the country is for unified action. Woodrow Wilson once wrote that "it craves a single leader."[1] But the Constitution of the United States did not contemplate that the country should have a single leader, and no President can assume that role without trenching upon the independence of the national legislature. Thus does the country's instinct, which is sound, conflict with the frame of government, which in this particular is defective. Mr. Wilson, five years before he became President, expressed the conviction that "the personal force of the President is perfectly constitutional to any extent to which he chooses to exercise it."[2] That conviction governed his course during his eight years in office. But the enthusiasm with which the country, in 1920, welcomed a return to the traditional method of government by cooperation and compromise would seem to indicate that it was not then reconciled to any plan of government by the personal force of the President. President Franklin Roosevelt, a disciple of Wilson, went even farther than his predecessor had ever dared to go. Whether the country, after the days of emergency are over, will eventually swing back to the time-honored scheme of government by checks and balances is something that only the future can disclose.

THE CONSTITUTION DOES NOT GIVE THE PRESIDENT THE AUTHORITY OF A NATIONAL LEADER.

The swing of the pendulum from men of strong personality to their very antitheses has been a noteworthy feature in the presidential cam-

[1] *Constitutional Government in the United States* (New York, 1908), p. 68.
[2] *Ibid.*, pp. 71–72.

paigns of the past sixty years. Chester A. Arthur was replaced by the rugged Grover Cleveland in 1885. Cleveland gave way to the colorless Benjamin Harrison for four years and then came back for a second term. He passed the scepter to William McKinley in 1897, and this mild Ohioan made way, in turn, for Theodore Roosevelt. The dynamic Rooseveltian regime was succeeded by Taft's four years of legalism and compromise. Then came Woodrow Wilson with a measure of assertive leadership which no President since Lincoln had ventured to assume. Eight years of it satiated the electorate. In 1920 the people avowed themselves weary of presidential government by electing Warren G. Harding to the White House. For a couple of years he smiled benignly in the front parlor while scalawags were raiding the pantry. Calvin Coolidge then took his place and let the ship of state drift along with the currents of industrial prosperity until 1929. He rode in the procession of progress with his face turned backwards. His successor, President Hoover, was by professional training and executive experience well qualified for the presidential office; but hardly had he become ensconced in the executive mansion before an economic typhoon appeared on the horizon. Within three years it gained a force that carried him (and would have carried any other President) out of office at the election of 1932.

STRONG PRESIDENTS AND WEAK ONES.

The country, gripped from end to end by a fear complex, called for a new deal. The election of Franklin Roosevelt ushered in an era of revolutionary changes in American politics, the like of which the nation had not witnessed since the days of Andrew Jackson, a hundred years earlier. Never in the entire history of the American Union has the government of the nation been so completely under the domination of a single will as it proved to be during this era of Roosevelt the Second. When the next swing of the pendulum will occur, and what distance it will go — these are questions which cannot be answered without entering the realm of prophecy. And prophecy is a game in which no sensible student of war or politics will ever engage.

THE TRANSITION ERA OF TODAY.

This, however, can safely be said. All through the centuries the public temper has veered from weak leadership to strong, from conservatism to liberalism, and from revolution to reaction — but always with a return ticket. The inclination to regularity in its lurches back and forth is greater than most observers of the political scene are likely to realize. If a prophecy must be made, then no prediction can be safer than that political momentum, when carried far in any one direction, will eventually exhaust itself. Then there is a revulsion, the force of which is almost

directly proportioned to the strength of the preceding swing. This is a law of politics and mechanics alike. Interludes of liberalism are essential to political progress, but they are disintegrating in their immediate effects upon government and hence are almost always followed, sooner or later, by periods of reaction and integration. This is the law of the pendulum and it is continually in play.

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See also the references at the close of Chapters XII and XXII.

CHAPTER XII

PRESIDENTIAL POWERS AND DUTIES

The desire to be a ruler is the most vehement of all the passions. — *Tacitus.*

THE INITIAL PROBLEM OF POWERS.

The framers of the Constitution faced a difficult problem in determining what powers should be given to the President. They were agreed that he should function as part of the system of checks and balances, able to hold Congress within bounds if need be. To that end he should be given a substantial amount of executive authority. On the other hand, it seemed equally important to place limits upon these presidential powers lest they be utilized to create an executive absolutism. In short, the problem was to create an executive sufficiently strong to ensure the faithful execution of the laws and yet not so strong as to open the door for a presidential dictatorship. Strong executives had been dangerous, as history showed. Weak executives had been safe but ineffective. The experience of the country under the Articles of Confederation had proved that proposition up to the hilt. Strength with safety was what the framers of the Constitution endeavored to combine in the presidential office — adequate authority, but with firm checks imposed upon it.

THEN AND NOW.

Today we have become so accustomed to the exercise of vast powers by the President of the United States that it is difficult to realize how deep-seated was the popular aversion to all forms of concentrated authority a century and a half ago. People could not rid themselves of the idea that political power was the gateway to oppression. And this is not surprising, for the pages of history prior to 1787 were cluttered with the names of rulers who had transformed a molehill of authority into a mountain of it. Naturally enough, George III of England was at this time the American idea of what a chief executive ought not to be. That being the case, the framers of the Constitution can hardly be blamed for trying to make certain that there would never be in America a George III — any one who would be able to accumulate so much power as this English monarch had gathered unto himself. In this they did not succeed, as everyone knows, for the amount

of authority vested in the President of the United States today is vastly more extensive than any ever exercised by the English monarchs of the eighteenth century.

The President of the United States derives his principal powers directly from the Constitution, which gives him in express terms the right to veto acts of Congress, to appoint officials of government and to make treaties (with the advice and consent of the Senate), to pardon offenders, to be commander in chief of the army and navy, to call special sessions of Congress, to demand written reports from the heads of the executive departments, to take care that the laws be faithfully executed, and to preserve, protect, and defend the Constitution. These are far-reaching constitutional powers which Congress can neither weaken nor take away.

SOURCES OF THE PRESIDENT'S AUTHORITY: 1. THE CONSTITUTION.

But in addition to the powers bestowed upon him by the express terms of the Constitution, the President of the United States has acquired a good deal of authority by statute. Congress, from time to time, has given to the President a wide range of discretion in supplying the details of the laws. In 1933, for example, it gave him discretionary power to reduce the gold content of the dollar, to issue additional paper money, and to purchase silver as a partial currency reserve. In 1941 it bestowed upon him, by the terms of the so-called Lend-Lease Act, a formidable range of executive discretion in the matter of furnishing ships, munitions, and supplies to those countries which were fighting against German world domination. Enormous appropriations of money have been made by Congress for relief, public works, aid to agriculture, and other purposes, with the stipulation that the specific expenditures shall be determined by executive order. Such action has placed a vast amount of power in the President's hands; but in situations of emergency there is no practicable way of avoiding it. Congress cannot stop to work out and agree upon all the details which are involved in the spending of a billion dollars for relief or several billions for military and naval armament. So the work of doing this is turned over to the President, who in turn devolves it upon his subordinates. Through this channel, executive authority has been rolling up at a rapid rate during recent years.

2. THE FEDERAL LAWS.

Again, the President has obtained some powers by means of judicial decisions. Where the Constitution is silent, the judiciary has been called upon to make it articulate. The Constitution, for example, gives the President the right to pardon offenders, but does not say whether he may pardon a man before he is con-

3. JUDICIAL DECISIONS.

victed. The Supreme Court has held that he possesses such power.[1] Likewise, the Constitution provides that the President shall appoint certain public officials with the advice and consent of the Senate, but it does not say whether this advice and consent shall be required for the removal of such officers. It has been held that the President's power of removal can be exercised without consulting the Senate.[2]

4. USAGE.

Some presidential powers have also been acquired by usage. For example, the President, while in office, is regarded as the leader of his party and is conceded the right to be consulted on all important matters affecting its interests, both in Congress and out of it. He virtually selects the chairman of its national committee and through him directs the party's activities. But usage also limits the President's powers. For example, the Constitution gives him full power to make appointments, subject only to the approval of the Senate; but the party system imposes upon him the obligation to consult with the individual senators or congressmen of his own party before he makes appointments in their states or districts. There is nothing in the Constitution to suggest that appointments shall be used as political patronage, but by long-continued custom it has been developed into a well-recognized policy. Theodore Roosevelt once asserted the doctrine that it is the President's right "to do anything that the needs of the nation demand unless such action is forbidden by the Constitution or the laws." But there is no warrant for any such philosophy, either in the Constitution or the laws.[3]

THE GROUPING OF EXECUTIVE POWERS.

It is not easy to make a logical grouping of all the powers and functions which have been acquired by the President from these various sources, but most of them can be arranged under seven principal heads: namely, (1) to serve as the nation's chief executive and to secure a faithful enforcement of the laws; (2) to make appointments and removals; (3) to exercise the prerogative of pardon; (4) to conduct diplomatic relations and negotiate treaties; (5) to send messages to Congress, issue executive orders when empowered by law to do so, and either sign or veto acts of Congress; (6) to be com-

[1] *Ex parte* Garland, 4 Wallace 333 (1866).

[2] Myers *v.* United States, 272 U. S. 52 (1926). But the presidential power of removal is limited in the case of boards and commissions which have quasi-legislative and quasi-judicial functions. Rathbun *v.* United States, 295 U. S. 602 (1935).

[3] For the views of some Presidents concerning what the functions of the presidential office are, or ought to be, the reader may be referred to W. H. Taft's *Our Chief Magistrate and His Powers* (New York, 1916); Grover Cleveland's *Presidential Problems* (New York, 1904); Theodore Roosevelt's *Autobiography* (New York, 1913), especially chap. x; Benjamin Harrison's *This Country of Ours* (New York, 1898), especially chaps. ix–xix; and Woodrow Wilson's *Constitutional Government in the United States* (New York, 1908), chap. iii.

mander in chief of the army and navy; and (7) to exercise the wide range of influence which accrues to him as the titular leader of his party. These powers are of such extensive scope as to warrant their careful consideration, one by one.

THE ENFORCEMENT OF THE LAWS

The President is the nation's chief executive, and there are implied executive powers as well as implied legislative powers. It is hard to determine the exact limits of the "executive power," which the Constitution expressly states shall be vested in the President; but the courts have been inclined to construe it liberally. In the famous Myers case, for example, the Supreme Court held that the President's right to remove public officers without the advice and consent of the Senate is implied in his general endowment of executive power and cannot be restricted by any action of Congress.[1]

EXPRESS AND IMPLIED EXECUTIVE POWERS.

The President is enjoined by the Constitution "to take care that the laws be faithfully executed," but this does not give him the right to suspend or delay the execution of any law because he believes it to be unwise or even unconstitutional. It is for Congress to decide the wisdom of a law, and the courts its constitutionality. The laws of the United States, however, include more than the statutes which have been passed by Congress. Treaties are included, because a treaty has the force of law. If the United States, for example, agrees to deliver up or extradite foreign fugitives from justice, that treaty becomes binding on all executive officials from the President down. And, if the need arises, the President may use the armed forces of the nation to see that its laws or treaties are faithfully executed. With the execution of laws passed by the state legislatures he has, of course, nothing to do. That is the function of the governor and other state authorities.

SCOPE OF THE POWER TO SUPERVISE THE EXECUTION OF THE LAWS.

The President's right-hand man in securing the faithful execution of the laws is the attorney general. This official may be directed by the President to bring an action in the courts against anyone at any time, even against one of the states of the Union. Or he may be advised to withhold the bringing of an action. The degree of vigor or leniency with which any federal law shall be executed is therefore to some extent within the President's discretion even though he has a constitutional duty to see that all laws are executed faithfully. The Sherman Anti-Trust Law of 1890 accomplished very

SOME DISCRETION CAN BE USED.

[1] Myers *v.* United States, 272 U. S. 52 (1926). See also p. 194.)

little throughout the administrations of Grover Cleveland and William McKinley. It was only when Theodore Roosevelt became President in 1901 that new and vigorous prosecutions by the attorney general compelled some of the so-termed trusts to comply with the law.

THE APPOINTING POWER

The President, of course, cannot give personal attention to the faithful execution of the federal laws throughout the United States. He must perform this duty through his subordinates, and the Constitution empowers him to make the necessary appointments, including "judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." These other officers include the members of the cabinet and their assistants, the members of all administrative boards and commissions, the officers of the army and navy, postmasters, customs officers, immigration officers, internal revenue collectors, the judges, attorneys and marshals of the subordinate federal courts, together with the great host of minor officials who have gained places on the federal pay roll.

MAJOR AND MINOR APPOINTMENTS.

In the entire national service of the United States (excluding the army and navy), there are now three million civil officers and employees of all grades. They range from the heads of the major departments at Washington down to postmen on the city streets and laborers in the forest service. All professions and trades are represented among them — under secretaries, assistant secretaries, bureau chiefs, commissioners, attorneys, engineers, geologists, accountants, statisticians, appraisers, customs examiners, bank examiners, auditors, supervisors and instructors on Indian reservations, health and quarantine officers, marshals, collectors and deputy collectors of revenue, social security officers, civilians connected with the bewildering number of special agencies, national park and forest workers, weather forecasters, clerks, stenographers. Together it is the rank and file in this civil army of three million men and women who "see that the laws are faithfully executed." Not one of them is elected. All are appointed by the President or by his immediate subordinates. As a matter of fact, there are only two elective officers in the entire administrative service of the United States: namely, the President and Vice-President.

THE GREAT ARMY OF FEDERAL EMPLOYEES.

How are these appointments actually made? The Constitution divides all appointive offices into two classes: those higher posts which must be filled by the President with the advice and consent of the Senate; and

those "inferior" offices which may be filled, if Congress so provides, by the President alone, or by the heads of departments, or by the courts. In the category of higher officers (appointed by the President with the concurrence of the Senate) are the members of the cabinet, the under secretaries and assistant secretaries, all ambassadors, ministers and consuls, all federal judges and court officials, members of the various federal commissions such as the interstate commerce commission, the federal trade commission, the federal communications commission, the national labor relations board, and the various other permanent commissions, together with collectors of customs and collectors of internal revenue. Promotions in the army and navy, above a certain rank, are also subject to senatorial confirmation. The line of demarcation between those appointments which require senatorial confirmation and those which do not is fixed by Congress when it establishes the office to which the appointment is made.

APPOINTMENTS SUBJECT TO SENATORIAL CONFIRMATION.

When confirmation is required, the President sends his nomination to the Senate, which may confirm or reject it. If the Senate is not in session when the nomination is made, the nominee takes office at once and holds what is termed a "recess appointment" until the Senate reconvenes and confirms him, or until the next session of the Senate comes to an end. If not confirmed by that time, the appointment lapses. But the President may forthwith give the same person a new recess appointment which will carry him over to the end of another session. Occasionally this procedure has been utilized to keep in office someone whom the Senate has declared its unwillingness to accept. A safeguard, however, is provided in the fact that a recess appointee, if the vacancy existed while the Senate was in session, draws no salary until his appointment is confirmed.

"RECESS APPOINTMENTS."

The Senate has an undoubted right to refuse its approval to any nomination which the President may send. But as a rule it allows the President to name the members of his own cabinet, confirming these nominations as a matter of course. On only one occasion during the past seventy-five years has it refused its approval to anyone selected by the President for cabinet rank.[1] And this is a proper attitude, for members of the cabinet are the President's immediate advisers, and in the nature of things he ought to have a free hand in choosing them. On the other hand, almost a fifth of the nominees for service on the Supreme Court have been rejected out-

USAGE IN THE MATTER OF CONFIRMATIONS.

[1] This was the case of Charles B. Warren, whom President Coolidge nominated to be attorney general in 1925. Altogether there have been seven such rejections.

right or effectively blocked.[1] Appointments to the diplomatic service have often failed of confirmation.[2] In all other instances the Senate freely uses its power to confirm or to refuse confirmation as it sees fit. But as a rule it does not withhold its consent except for some substantial reason, although much depends upon whether the President and a majority of the senators are of the same political faith. A bare majority of the senators present is sufficient to confirm a presidential appointment. It does not require a two-thirds vote as in the case of approving treaties.

THE RULE OF SENATORIAL COURTESY.

Many years ago there developed a curious twist in connection with the practice of confirming appointments. It is commonly known as the "courtesy of the Senate." Stated briefly, this is the custom of refusing to confirm the nomination of any local officer, such as a federal attorney, postmaster, or collector of internal revenue, unless the individual senator or senators from the state concerned have been previously consulted and have given their approval; provided, of course, that these senators are of the same political party or party faction as the President. To put it more concretely, a Republican President must not nominate anyone as collector of the port of Philadelphia without first consulting the Republican senators (if there are any) from that state.[3] If he does so, the other senators, out of courtesy to their Pennsylvania colleagues, are supposed to vote against confirmation.

ITS FLEXIBILITY.

Senatorial courtesy has had its ups and downs; it has been strong enough at times to hamstring the chief executive almost completely; on the other hand, some Presidents have successfully defied it. President Garfield, for example, locked horns with the two senators from New York State on this matter in 1881 and won a signal victory. President Theodore Roosevelt, to use his own words, "normally accepted each senator's recommendations for offices of a routine kind, such as post offices and the like," but "insisted on personally choosing the men for the more important positions." Still, no matter what the President's personal inclinations may be, he is sure to find that he can avoid trouble by antagonizing the individual senators as little as possible. The President has only half the appointing power; the Senate has the rest.[4]

[1] George H. Haynes, *The Senate of the United States: Its History and Practice* (2 vols., Boston, 1938), Vol. I, pp. 753–760.

[2] *Ibid.*, Vol. I, pp. 767–768.

[3] Republican Presidents generally follow the advice of party leaders with respect to appointments in the Democratic Solid South.

[4] See also pp. 288–290.

But the great majority of federal appointments do not require confirmation at all. In the case of subordinate and minor officials, the power of appointment has been vested by action of Congress in the President alone or in the heads of the various departments, such as the postmaster general or the secretary of the treasury. More than 95 per cent of all federal appointments are in this category. About 30 per cent of these positions are still treated as "patronage" and are filled on the recommendation of congressmen from the districts concerned; but by far the greater portion of them have been placed in the "classified service" and the appointees are chosen under civil service rules (the merit system). The way in which the old spoils system of making appointments to subordinate posts has been broken down by the civil service laws will be explained in a later chapter.[1]

MINOR OFFICES.

REMOVALS

The Constitution provides that civil officers of the United States may be removed by impeachment if convicted of treason, bribery, or other high crimes or misdemeanors. But it does not say how or by whom these officials may be removed for incompetence or for the good of the service. This problem of dismissal arose at an early date, and in the first session of Congress (1789) it was debated. Some congressmen felt that if the concurrence of the Senate was necessary for appointments it should also be required for removals. Others argued that the President could not be held responsible for the faithful execution of the laws unless given a free hand to dismiss those subordinate officials whom he regarded as incompetent. In the end this view prevailed. On a few occasions Congress has attempted to restrict the President's freedom in making removals, but without much success.

EARLY PRACTICE.

A notable instance occurred in 1867 when Congress passed the Tenure of Office Act with the plain purpose of preventing the removal of various officeholders by President Andrew Johnson. This law provided that any person holding a civil office to which he had been appointed with the confirmation of the Senate should remain in such office until his successor was in like manner appointed. It was vetoed by the President, but Congress passed it over his veto. Then the President disregarded it as unconstitutional, and this was one of the grounds upon which he was impeached. Subsequently the Tenure Act was repealed. It is now generally conceded to have been an unconstitutional enactment.

THE TENURE OF OFFICE ACT (1867).

[1] See Chapter XVI.

Later, in 1876, Congress tried once more to restrict the President's authority by providing that certain classes of postmasters could not be removed from office except with the advice and consent of the Senate. The constitutionality of this restriction did not get before the courts in any clean-cut fashion until President Wilson challenged it (1920) by summarily removing a postmaster without senatorial concurrence. The dismissed postmaster carried the matter to the Supreme Court, which held in a notable decision that the power to remove appointive officers was vested in the President as the nation's chief executive and could not be abridged by statute.[1] The decision in this case, it may be mentioned, was written by a Chief Justice who had himself served a term as President.

THE MYERS CASE.

But in spite of this decision, the President's power of removal does not extend to every appointive official of whatever rank or status. In 1935 there came before the Supreme Court a question whether a member of the federal trade commission could be removed by the President for reasons other than those stipulated in the statute which had created this commission. The decision in this case was that when the laws prescribe the grounds upon which a member of an administrative board can be removed, the President must keep within the bounds prescribed and cannot make dismissals on any other grounds.

So, three classes of officeholders are exempt from the President's unrestrained power of removal: first, the judges of the federal courts, who can be removed by impeachment only. Second, members of various boards which have been set up by Congress and who cannot be removed except in accordance with such conditions as Congress has imposed in establishing their offices.[2] Third, those officials and employees who have secured their appointments under civil service rules and may not be removed "except for such causes as will promote the efficiency of the service." This limitation, however, is not a serious obstacle to a President who desires to make removals on political grounds, but in practice its spirit has been well respected.

While the foregoing limitations have done much to mitigate the worst evil of the spoils system — namely, the ruthless dismissal of public officials to make room for party henchmen — it should not be supposed that patronage has been wholly abolished in the federal service. Many thousands of well-paid offices are

SOME PATRONAGE STILL REMAINS.

[1] See footnote p. 188. For discussions of the general question, see also E. S. Corwin, *The President's Removal Power under the Constitution* (New York, 1927); James Hart, *Tenure of Office under the Constitution* (Baltimore, 1930); and George H. Haynes, *op. cit.*, Vol. II, pp. 827–835.

[2] Rathbun *v.* United States, 295 U. S. 602 (1935). Also cited as Humphrey's Executor *v.* United States.

still within the gift of the President. He can fill these positions, many of them with large salaries attached, according to his own desires or preferences. He is still pressed upon all sides by office seekers and their congressional friends; he is held responsible for appointments which of necessity he must make without any personal knowledge whatever, and is under constant temptation to use the appointing power in ways that will ensure his own renomination or promote the interests of his party. An unscrupulous President, if he chose to misuse the extensive powers of appointment and removal which still remain in his hands, could build up a personal and political machine of almost irresistible strength, for, despite the limitations of Senate approval and civil service laws, the appointing power is today infinitely more extensive than could have been envisaged when the foundations of the Republic were laid.

THE POWER OF PARDON

The President has inherited from the ancient prerogative of English kings the power "to grant reprieves and pardons." He may pardon any offense (crimes) against the federal laws, but he has no authority to grant pardons for offenses against the laws of a state. A pardon may be either partial or complete: that is, conditions may be attached to it, or it may be unconditional. One limitation is imposed upon the President by the Constitution, however, in that he can grant no pardon in cases of impeachment. This embodies a lesson which the framers of the Constitution drew from England where an accused royal adviser sometimes went to his impeachment with the king's pardon already in his pocket. The power to pardon is linked with the power to reprieve — that is, the right to stay the enforcement of a penalty. A general pardon, granted to a large number of offenders, is called an amnesty. President Johnson issued two of them after the close of the Civil War to those who had borne arms for the South. The pardoning power, it need hardly be said, is not exercised by the President at his own caprice, but on the recommendation of the department of justice after the latter has made a full study of the case.

APPLICABLE ONLY TO CRIMES AGAINST THE UNITED STATES.

DIPLOMACY AND DEFENSE

There are times when two great and far-reaching powers of the President seem to transcend all others. These are his powers in the fields of diplomacy and of national defense. The foreign relations of the United States are almost wholly under the general direction of the President, with the one important limitation that no treaty made by him is valid until it has been approved by a two-thirds vote in the Senate. Likewise, as

commander in chief of the army and navy, the President has the general direction of the national defense, but here again his authority is subject to various limitations. These two branches of presidential authority are of such importance that they deserve more than a few paragraphs and hence will be reserved for consideration in separate chapters.[1]

POWERS IN RELATION TO LAWMAKING

THE PRESIDENT AND CONGRESS.

It may sound strange to speak of the "lawmaking powers" of a chief executive. One might suppose that the principle of separation of powers, to which the framers of the Constitution gave so much reverence, would require the exclusion of the executive from all share in lawmaking. But the President was, in fact, endowed by the Constitution with substantial powers in relation to the making of the national laws, and these powers have now become greatly expanded. Under the terms of the Constitution he is entrusted with certain definite functions in relation to lawmaking: for example, the right to call special sessions of Congress; to recommend the passage of laws; to sign bills after they have been passed, or to veto them.

RESTRICTIONS UPON THE POWER TO CALL AND ADJOURN CONGRESS.

The President, it should be noted, does not call Congress together except in special session. The time for the beginning of *regular* sessions is fixed by law. Nor can he adjourn Congress unless the two Houses fail to agree between themselves as to the time of adjournment. The power to dissolve any legislative body before its term has expired does not exist in the United States. The House of Representatives finishes out its two-year term, no more, no less. On the other hand, the President does have a great deal to do with the length of congressional sessions. He can urge Congress to stay in session until important measures have been passed; and his urging can be reinforced by the threat of a special session, immediately after adjournment, if Congress should go home too soon. This is no empty threat because members of Congress are paid by the year and get no additional compensation for attending an extra session if one is called.

CALLING SPECIAL SESSIONS.

In issuing a proclamation calling for a special session, the President states the purpose of the call and the matters to be dealt with at the special session; but Congress is not limited thereby. It can take up other matters if it so desires. Most of the state constitutions, by way of contrast, provide that, when a state legislature has been called into special session by the governor, it may deal only with matters listed in the call. Special sessions of Congress are

[1] See Chapters XXX–XXXI.

not called except when emergencies arise. A special session may last for a few days only, or it may continue until the date for the next regular session arrives.

THE POWER TO RECOMMEND MEASURES.

The Constitution, again, requires the President to "give to the Congress from time to time information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." This is the basis of the President's right to send messages to Congress, a right which has been freely used from the outset. The wording would seem to indicate that the makers of the Constitution had no thought that the nation's chief executive should play an inarticulate role in the planning of national policies. They imposed upon him a constitutional duty to inform himself concerning the "state of the Union," to transmit this information to Congress, and to recommend whatever measures he might think fit. To that extent they discarded their allegiance to the principle of separated powers. Those who argue that the President should never assume the initiative in legislation should give heed to this constitutional provision.

ANOTHER PHASE OF THE PRESIDENT'S LEGISLATIVE POWERS: THE SYSTEM OF "EXECUTIVE ORDERS."

In addition to the exercise of an influence upon the making of the laws, the President virtually legislates on his own account. This he does by the issue of "executive orders," which have virtually the force of law.[1] Theoretically, "a government of laws, not of men" requires that the laws shall be comprehensive and specific, that is, both broad enough and detailed enough to cover all cases that may arise. But as a practical matter this is quite out of the question under conditions of today. Take the federal income tax law, for example. To specify every detail relating to the figuring of exemptions, deductions, allowances, depreciations, depletions, capital gains and losses, consolidated returns, and so on would expand the law to a thousand pages. Congress could not possibly give the time necessary to work out all those details. What is more, the embodying of such detailed provisions in a statute would give them a highly inconvenient rigidity. None of them could be changed except by congressional action. But by a stroke of the President's pen an executive order, rule, or regulation can be modified at any time. The courts have held that this practice, when kept within reasonable bounds, does not constitute a delegation of legislative power by Congress.

A great expansion of the President's power to issue executive orders

[1] In 1935 Congress passed a law (the Federal Register Act) requiring that all executive orders, decrees, and proclamations having general applicability and legal effect must be published in the *Federal Register*, which is issued daily.

has taken place in connection with the emergency legislation of the past ten years. Congress has had neither the time nor the technical knowledge which would enable it to work out the details of statutes relating to such matters as work relief, assistance to agriculture, federal housing loans, industrial mobilization, emergency shipbuilding, the raising of an army by selective service, the lending and leasing of war materials, and so on. Consequently it has been virtually forced to enact such measures in rather broad terms, with an included stipulation that the President (or some administrative agency under his direction) should have power to make such rules and regulations as might be found necessary within the scope of the general provisions of the law.

WHAT EXECUTIVE ORDERS DEAL WITH.

Executive orders regulate the details of administration in many important branches of government: for example, in the postal and immigration service, the collection of customs duties, as well as in the patent, pension, and internal revenue offices. But let it be made clear that executive orders and regulations are not supposed to change any provision of the laws; they profess merely to supplement, elaborate, and apply provisions which Congress has made. It is true, however, that they sometimes edge out a little farther than they are supposed to go. Occasionally they give a twist to legislation which Congress did not intend. Hence the power to work out the details of a law by executive order becomes in effect a subsidiary branch of the lawmaking authority. At any rate, the whole procedure is tantamount to a confession that under the complex economic and social conditions of today a government cannot remain exclusively a "government of laws." It must be to some extent a government of men who are vested with power to supplement the laws.

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CHAPTER XIII

THE CABINET: ITS PLACE IN THE SCHEME OF GOVERNMENT

The principles of a free constitution are irrecoverably lost when the legislative power is dominated by the executive. — *Edward Gibbon.*

THE GENESIS OF THE CABINET.

The practice of surrounding the chief executive with a circle of advisers or ministers, chosen by himself, is one of the oldest in the history of government. It appeared in England under the Anglo-Saxon kings and became recognized as a regular feature in the government of the realm under the Normans. In due course, this body of royal advisers became the privy council, out of which the British cabinet arose.

THE FRAMERS OF THE CONSTITUTION DID NOT REGARD A CABINET AS ESSENTIAL.

BUT MADE PROVISION IN THE CONSTITUTION FOR HEADS OF DEPARTMENTS.

The builders of the American federal system were well acquainted with this historical development as well as with the work of the governor's councils, which had existed in some of the colonies before the Revolution. But they had not been favorably impressed with this colonial adaptation of the British system and after some debates had rejected a proposal to include provision for a council of state in the new Constitution. On the other hand, they realized that the President could not himself do all the executive work which the new federal government would require; so they took for granted that he would appoint subordinates to help him. Wisely they did not attempt to designate what positions these presidential coadjutors should hold, or what their duties should be, but left it for Congress to determine what executive departments there should be as a means of doing the work under the President's direction.

DEPARTMENTS WHICH HAVE BEEN ESTABLISHED BY CONGRESS.

"The President may require the opinion in writing of the principal officer in each of the executive departments." That is all the Constitution has to say about the President's relation to his chief executive advisers. Congress establishes a department, defines its functions, limits its authority, and makes appropriations of money for its maintenance. Three executive departments were established at the very first congressional session in

1789: namely, the state, treasury, and war departments. A postmaster general and an attorney general were provided in the same year, but their offices did not at the outset rank as regular departments. They became departments later (in 1829 and 1870 respectively); and Congress has from time to time established others with departmental status: — the navy in 1798, the interior in 1849, agriculture in 1889, commerce in 1903, and labor in 1913, making ten regular departments in all. The heads of these ten departments are by custom, and by custom only, entitled to membership in the cabinet.

STATUS OF THESE DEPARTMENT HEADS.

The head of each department (secretary of state, attorney general, postmaster general, as the case may be) is appointed by the President with the consent of the Senate. But this consent, as has already been stated, is almost never withheld.[1] A new President announces his selections immediately after his inauguration, and the appointees usually hold their posts till the end of his term, although they may be removed at any time. Removals or dismissals in the ordinary sense of the word are rare, but resignations because of failure to work in harmony with the President have sometimes occurred. It is clearly understood that every member of the cabinet must be loyal to the President in all things, and that if any serious estrangement arises the resignation of the dissenter should be submitted without delay. There may be differences of opinion around the cabinet table, but, when a decision is reached by the President, the members of the cabinet must fall in with it, at least so far as their public actions and pronouncements are concerned. The cabinet must at all times present to the world an outward solidarity.

THEY SHOULD NOT BETRAY CONFIDENCES.

Its meetings, therefore, are secret. Whatever is discussed or decided should reach the public only with the President's permission. Nevertheless, leakages do occur. President Wilson was troubled by them early in his first administration. On one occasion he said to his Secretary of Agriculture, David F. Houston:

> I am embarrassed by the fact that one or two members seem to be unable to refrain from telling everybody what happens in cabinet meetings. I wish to advise with the cabinet freely. Some things cannot be given publicity; at any rate, at once. It is important to consider what shall be said, and how and when. I ought to have the privilege of determining this. The discussions should be free and full. If they cannot be kept within the family, leaving it to my discretion when and what to give out, it will make it difficult for me to canvass confidential matters as I should like.[2]

[1] See pp. 191–192.

[2] D. F. Houston, *Eight Years with Wilson's Cabinet* (2 vols., Garden City, N. Y., 1926), Vol. I, p. 87.

Secretary Houston, bringing the matter before the cabinet as if he had not been prompted to do so, asked the President for his judgment and there appears to have been an exchange of views. The cabinet agreed that, when general policies had been under consideration, nothing concerning such discussion should be made public except at the President's request.

Cabinet solidarity, however, may be more apparent than real. Personal antagonisms, long kept from public knowledge by official reticence, may suddenly burst into an open rupture. At Paris, while peace was being negotiated in 1919, the relations between President Wilson and his Secretary of State, Robert Lansing, became severely strained; but it was not until February, 1920, and then on quite a different issue, that Lansing was forced to resign. This is what seems to have happened: The President, after his return from Paris, had suffered a stroke of paralysis and for several months was isolated in the White House. The extent of his incapacity could not be accurately learned because of the secrecy with which he was surrounded. Under the circumstances Secretary Lansing, as senior member of the cabinet, took it upon himself to summon meetings of that body at which, it is said, the President's condition was discussed. When President Wilson heard of this action after his partial recovery, he denounced it as a most serious breach of the constitutional proprieties.[1] The few precedents hardly support him in this, however, for Secretary Blaine had followed a similar course during the prolonged illness of President Garfield. Perhaps Wilson suspected that there might have been a plan to declare him incapacitated and to ask the Vice-President to take over the powers and duties of the presidential office in accordance with the constitutional provision covering such eventualities. But it seems more likely that President Wilson was influenced by what he regarded as Mr. Lansing's failure to cooperate with him loyally at Paris.

OR TRENCH ON THE PRESIDENT'S AUTHORITY.

[1] In his first letter to Lansing (February 7, 1920), the President said: "Is it true, as I have been told, that during my illness you have frequently called the heads of the executive departments of the government into conference? . . . Under our constitutional law and practice, as developed hitherto, no one but the President has the right [to do so] and no one but the President and the Congress has the right to ask their views or the views of any one of them on any public question." Four days later the President wrote in reply to Lansing: "You kindly explain the motive of these meetings, and I find nothing in your letter which justifies your assumption of presidential authority in such a matter . . . I have to remind you, Mr. Secretary, that no action could be taken without me by the cabinet and that therefore there could have been no advantage in not waiting action with regard to matters concerning which actions could not have been taken without me." Lansing continued to assert the propriety of his conduct. He wrote: "I cannot permit to pass unchallenged the imputation that in calling into informal conference the heads of the executive departments I sought to usurp your presidential powers . . . I cannot agree with your statement that I have tried to forestall your judgment in certain cases by formulating action and merely asking for your approval."

In selecting the heads of his executive departments, the President is not limited by the Constitution in the range of his choice. He may select whom he pleases. But if he happens to select a senator or a member of the House of Representatives, the appointee can no longer sit in Congress. No senator or representative can hold any other office under the United States, even a minor postmastership. But while the Constitution gives the President a virtually free hand in constructing his cabinet, there are various practical considerations which he must keep in mind. For one thing, he almost always selects the members of the cabinet from within the ranks of his own political party. Washington endeavored to make selections from among men of different political affiliations; for that reason he chose Thomas Jefferson as secretary of state and Alexander Hamilton as secretary of the treasury. Both were admirably qualified for their respective offices; but they stood widely apart in their political views and were frequently at odds, much to Washington's embarrassment. So, the practice of choosing the cabinet from the President's own political supporters was adopted as a means of ensuring harmony; and it has since been generally followed, although with occasional exceptions to the rule. The most recent example of a deviation from the traditional practice was the action of President Roosevelt (1940) in calling to his cabinet two prominent Republicans, namely, Henry L. Stimson as secretary of war and Franklin Knox as secretary of the navy.

HOW SELECTED.

This does not mean, however, that the President usually takes the leaders of his party into the cabinet. Some leaders may be given this recognition after a victorious campaign; but cabinet positions, for the most part, are not used as a means of rewarding the top-flight party strategists. Whatever may have been the case fifty years ago, the enormous expansion of executive work has made it essential that the heads of departments shall be competent supervisors of administration. For this reason it sometimes happens that, when a member of the cabinet dies or resigns, his chief subordinate is promoted to the vacant post. On the other hand, it is thought desirable to have at least one seasoned party war horse in the cabinet, especially as an adviser on matters of practical politics, and usually a man of this type has been appointed to the office of postmaster general.

This distinguishes our practice from that of Great Britain, the British Dominions, and other countries where responsible parliamentary government prevails. In Great Britain, for example, the way to high political office lies through long service in the House of Commons. By this selective process leaders can

CONTRAST WITH BRITISH PRACTICE.

be found when they are wanted, without protracted search or perilous experiment; and after a man has once achieved cabinet rank, his claim to future recognition binds the prime ministers of his party as long as his orthodoxy, public reputation, or mental vigor remains unimpaired. When a new cabinet is being formed, the newspapers are fairly accurate in foretelling its personnel. They speculate about the septuagenarians who may drop out and the young men who may force their way into the charmed circle. They may falter in dealing with the distribution of places. How could they know that, because of an impending shift in foreign policy, the former secretary for India would go to the foreign office or that, because of a projected reorganization of the law courts, the former lord chancellor, being stubbornly opposed to it, would become lord privy seal at half the salary? What impresses one above all else, however, is the continuity of personnel, the existence of a career in political office. It is only by a gradual process that the men at the top are sloughed off and room thus made for the slow infiltration of young men from below.

In the United States, on the other hand, cabinet office is not looked upon as a career. It "is an interlude in a career," as Laski says, leading towards no definite goal.[1] "The composition of a cabinet is unpredictable. Many of its members, after their term of office, retire into the obscurity from which their elevation brought them."[2] The Taft cabinet (1909–1913) will serve as an illustration.[3] In an expansive moment, after his nomination but before his election, Mr. Taft expressed his intention to reappoint the members of the outgoing Roosevelt administration, but when the time came he retained only two of them. Then, finding the task of filling the remaining posts a picture-puzzle problem, he allowed weeks to pass without reaching final decisions. In the end, six of the nine cabinet posts were given to lawyers; for Taft was a lawyer of such eminence that he later became Chief Justice of the United States, and he trusted men of his own profession. But one can hardly say that as a group they conspicuously justified their selection.

TAFT'S CABINET.

President Wilson in 1913 received a good deal of advice respecting the personnel of his cabinet. Yet three days before the inauguration he still had to decide upon a secretary of war. In this dilemma Mr. Wilson then turned for suggestions to his secretary, Tumulty, whose political sagacity he trusted.

WILSON'S CABINET.

[1] Harold J. Laski, *The American Presidency* (New York, 1940), p. 87.
[2] *Ibid.*, p. 71.
[3] Henry F. Pringle, *The Life and Times of William Howard Taft* (2 vols., New York, 1939), Vol. I, pp. 381–386.

I informed the President [Tumulty tells us [1]] that I would suggest the name of some one within a few hours. I then went to the library in my home in New Jersey and in looking over the *Lawyers' Diary* I ran across the name of Lindley Garrison, who at that time was vice-chancellor of the state of New Jersey. Mr. Garrison was a resident of my home town and although I had only met him casually and had tried a few cases before him, he had made a deep impression upon me as a high type of equity judge. I telephoned the President-elect that night and suggested the name of Lindley Garrison, whose reputation as a distinguished judge of the Chancery Court was known to the President-elect. He was invited to Trenton the next day and without having the slightest knowledge of the purpose of this summons, he arrived and was offered the post of Secretary of War in Mr. Wilson's cabinet, which he accepted.

ALLEGED MEDIOCRITY OF CABINETS.

This way of doing things may seem haphazard. But the incident just related is not an isolated one. Before his inauguration Wilson had never met the man whom he appointed secretary of the interior. Hence it is not surprising that one member of this cabinet, in writing of its first meeting, said: "I decided without much difficulty that it was not a particularly able group of men — cabinets seldom are." [2] This lack of outstanding ability was not a catastrophe, however, because President Wilson seldom sought or took the advice of his cabinet. He expected its members to assume full responsibility for the business of their respective departments, consulting him only on matters of unusual importance. This would be good administrative practice if members of the cabinet were in all cases men of sound judgment and discrimination. Or, as one of President Wilson's ablest associates has expressed it: "If a head of a department is competent, if he has first-rate executive ability, he can spare the President much time and worry. The trouble is that the average head of a department is not highly competent and has not first-rate executive ability. . . . If the Presidents of the United States had more efficient aids and were better served, they might live longer." [3]

[1] Joseph P. Tumulty, *Woodrow Wilson as I Know Him* (Garden City, N. Y., 1921), p. 138.

[2] David F. Houston, *Eight Years with Wilson's Cabinet* (2 vols., Garden City, N. Y., 1926), Vol. I, p. 40.

[3] *Ibid.*, Vol. I, p. 89. It has been urged on numerous occasions during the past eighty years, notably by President Taft in his last message to Congress, that cabinet officers be permitted to appear on the floor of both Houses for the purpose of engaging in debate and required to attend for the purpose of answering questions. This proposal is discussed at the end of the next chapter. But one point deserves emphasis here. Those who favor the change — as a step towards parliamentary government — often assume that it would improve the quality of cabinets. Samuel W. McCall, a distinguished representative from Massachusetts, expressed this opinion more than thirty years ago. He complained that members of the cabinet "quite frequently" had displayed no aptitude for public affairs or were without any experience in them. Such men could not hold their own in congressional debate; they would be replaced by men who had previously served in Congress, who had become familiar with national affairs, and who had at the same time talent in administration. "The time would end when it would be possible to have a second-rate lawyer as head of the Department of Justice." *The Business of Congress* (New York, 1911), p. 196.

GEOGRAPHICAL AND OTHER CONSIDERATIONS.

Geography, of course, is to some extent a factor which influences the work of cabinet-making. No President, under normal conditions, would draw his entire cabinet from the North or the South, the East or the West. If he did so there would be strong resentment in the neglected regions, with political repercussions as a result. All this does not imply, however, that the President feels under obligation to distribute cabinet positions to the various regions of the country on a proportional basis. Sometimes a single state is called upon for two, or even three, members of the cabinet, while its more populous neighbors may have no representation at all. In a word, the cabinet is not a representative body; when concessions are made to the idea of geographical distribution, it is merely because good political strategy seems to require it.

In organizing his cabinet, the President also keeps in mind the desirability of satisfying the different factions of his party, if there are such factions. He will not make all his selections from either the conservative or the radical elements, but will try to take some representatives from each. Organized labor always expects, and almost always gets, recognition in the cabinet's membership. And every President, in choosing his circle of official advisers, is to some extent influenced by considerations of personal friendship. Nearly every cabinet during the past fifty years has contained at least one member who owed his inclusion to the fact that he was a close personal friend of the President.

SPECIAL FITNESS AND EXPERIENCE.

In the public mind there lurks the idea that members of the cabinet, as directing heads of great administrative departments, ought to be experts in their respective fields — that the secretary of the treasury ought to be a past master in finance, the secretary of agriculture a "dirt farmer," the secretary of commerce a business man of wide experience, especially in foreign trade, and the secretary of labor someone with a union card in his pocket. That idea is not in accord with the philosophy of democratic government. The secretary of agriculture is not supposed to serve the farmers of the United States but the people of the United States. Expertness is needed in all the executive departments, but not necessarily at the head of it. Otherwise, there would be every reason for picking the secretary of war from among the generals and the secretary of the navy from among the admirals. That is what they always did in pre-war Japan, for example; but the United States has avoided such a course, and wisely so. Apart from the attorney general, who from the nature of his duties ought to be a lawyer, there is no good reason for insisting upon technical proficiency at the head of any department and allowing this to outweigh general qualifications.

So bear in mind that the cabinet is not intended to be a representative body, or a professional group, or a check upon the President. As a body, its members are, officially at any rate, the confidential advisers of the chief executive. But they are also the President's chief subordinates in performing his constitutional duty to see that the laws are faithfully executed. In selecting members of his cabinet it is difficult to find men who are equally valuable in both capacities — good confidential advisers and competent chief administrators. During recent years it has become apparent that the advisory function of cabinet members is no longer regarded as of prime importance. Presidents have developed their own intimate circle of confidential advisers outside the ranks of the cabinet. Men who hold no official positions at all sometimes exert more influence upon executive decisions than do those occupying the highest cabinet posts. This has become particularly noticeable during the past dozen years.

A MISTAKEN POPULAR IDEA CONCERNING THE CABINET.

Taking one consideration with another, the cabinet of the United States is likely to be a variegated group, in the composition of which geography, conciliation, compromise, gratitude, political strategy, administrative competence, personal intimacy, and even plain inertia or haphazardness play a varying part. It is sometimes said that a President is known by the cabinet he makes; and, since no two chief executives are alike, their cabinets will differ correspondingly. President Theodore Roosevelt acquired a cabinet with a variety of minds, but by force of his assertive personality soon had them all marching in line with him. President Wilson chose men (or tried to choose men) whose "minds ran along with his own." President Coolidge inherited a cabinet from his predecessor, made few changes in it, and deferred a good deal to its collective judgment. President Franklin Roosevelt tried to organize and keep a group representing both the conservative and liberal elements of his party, besides taking some members from outside the Democratic ranks altogether. For advisory assistance, moreover, he drew to a greater extent than any of his immediate predecessors upon sources outside the cabinet altogether. Some Presidents think of cabinet members as colleagues, others as subordinates. Some want men of ideas and initiative; others prefer to supply the ideas and the initiative themselves.

A VARIEGATED GROUP.

THE CABINET'S FUNCTIONS

In discussing the powers and duties of the cabinet, it is therefore essential to keep in mind the distinction between the *advisory* function

of the cabinet as a whole and those *administrative* duties which are performed by its members individually, as heads of their own departments.

POWERS AND FUNCTIONS OF THE HEADS OF DEPARTMENTS:

I. AS A BODY.

The advisory function rests upon custom alone; it has no definite constitutional or legal basis. The cabinet as a body is merely a group of high officials whom the President may call together for consultation if and when he chooses to do so. As a matter of usage, however, he does call them normally once a week (on Fridays) during sessions of Congress and finds plenty for them to do at these meetings.[1] What is there to do? One cannot say more than that the cabinet discusses whatever the President sees fit to lay before it, and gives its advice when he asks for it. It has no set of bylaws, rules of procedure, or field of jurisdiction. Its proceedings are conducted informally, in a conversational manner around the table. There are no motions or amendments, no formal speeches. Sometimes the President has already made up his mind on some question and merely brings it before the cabinet for its information, or for suggestions as to details.

Lincoln, for example, did not consult his cabinet on the Emancipation Proclamation until he had himself decided that it ought to be issued.

RELATIONS WITH THE PRESIDENT.

Andrew Jackson, a generation earlier, found his cabinet an encumbrance upon his freedom of decision; and for nearly two years he called no meetings at all. General Grant carried his military traditions into the White House and dealt with members of his cabinet as though they were second lieutenants, whose duty it was to carry out the orders of their captain. Grover Cleveland, imperious though he was in some ways, had a high respect for the judgment of his cabinet members and followed their counsel on most matters. Theodore Roosevelt sometimes acted first and explained afterwards. The members of Woodrow Wilson's cabinet occasionally got their first information about presidential action from the newspapers, and the same is said to be true of some who served in the cabinet of Franklin D. Roosevelt.

In addition to its weekly meetings, the cabinet may be summoned for special meetings. The members used to sit at an oblong table in order of

CABINET MEETINGS.

seniority: the President at the head, the secretary of state on his right, the secretary of the treasury on his left, and so on down both sides of the table. Recently a new oval table has been substituted and the President now sits at the middle of it, with his cabinet members flanking him in order of seniority. If the head of a

[1] Before the administrations of President F. D. Roosevelt it was customary to meet twice a week, Tuesday and Friday, at eleven in the morning.

department happens to be ill, or absent from Washington, the under secretary in that department, or an assistant secretary, is sometimes asked to attend in his place. No formal records of the discussions are kept, and no summary of the proceedings is ever given to the public. Whether the President asks, receives, accepts, or disregards advice from his cabinet is never known, save in rare instances, and then long after the event has passed. It would be a grave discourtesy to the President, were any member of the cabinet to make public what transpires around the table. If there is anything to announce, the President makes it public as his own action and not as a decision of the cabinet.

THEIR VALUE.

The best service performed by these cabinet meetings is the avoidance of friction or misunderstandings among the several departments. They provide a clearing house which helps the administration to put unity into its program. With this in mind, the President usually calls upon the members of the cabinet, one after another, to present any matter that concerns the interests of more than one department or raises some issue of general policy. If the President is sending an important message to Congress, he sometimes reads it to the cabinet in advance. Everything is done with proper dignity at these meetings, but in an informal way, and always with close attention to the business in hand. A cabinet made up of able and experienced men, provided with a reasonable degree of political sophistication, can be a great help to a weak President, and even by a strong one its helpfulness is not to be despised.

HEADS OF DEPARTMENTS AS ADMINISTRATORS

2. AS INDIVIDUALS.

More vital than the functions of the cabinet as a body are those of its members as individuals, as heads of departments. Every head of a department is responsible to the President and is under his direction at all times, but in practice each is allowed a considerable range of independence. This must necessarily be the case; for, if everything could be supervised directly by the President himself, there would be no need for department heads at all. Even in a single department there is always more to do than its official head can personally attend to; hence each department has one or more assistant secretaries, who assume part of the work which would be done by the chief if there were less of it to be done. Some departments also have an under secretary who ranks next to the department head and assumes charge when the latter is absent.

Each department, moreover, is divided into bureaus under bureau chiefs or commissioners. The bureaus, in turn, are split into smaller units

called divisions. But this disintegration is not uniform in all departments. Some have divisions above the bureaus and some have branches, offices, commissions, subdivisions, and sections, related to each other in a way that is very confusing to an outsider. The internal organization of each department is usually prescribed by law, but it has grown step by step over a long term of years and reflects the idiosyncrasies of successive Congresses. On more than one occasion the President has been given power to do a certain amount of consolidating and rearranging, but the administrative structure remains a badly tangled mass.

THE DISINTEGRATION OF DEPARTMENTAL MACHINERY.

The scope of work handled by these bureaus, divisions, and other subordinate branches is very extensive. With the expanding functions of federal government, moreover, it has grown by leaps and bounds. The administrative machinery at Washington is now many times more complex than it was a dozen years ago. Not only has the work of the various departments been divided, redivided, and subdivided among subordinate offices, but many new administrative boards and commissions, some of them exercising functions of the highest importance, such as the interstate commerce commission, the federal trade commission, the civil service commission, the tariff commission, the federal communications commission, the civil aeronautics board, the national labor relations board, the reconstruction finance corporation, the securities and exchange commission, the veterans' administration, and a score of other units, are working outside the purview of the ten regular departments. Of these, however, more will be said in a subsequent chapter.

THE ELABORATION OF INDEPENDENT BOARDS AND OFFICES.

The functions of each department are defined in part by law and in part by executive orders. Within these bounds the head of the department has the right to make rules for the conduct of departmental business. This is done by issuing departmental orders and regulations, some of which are full of detailed provisions. The regulations of the treasury department relating to the collection of the revenues, for example, would fill a whole volume. The same is true of the regulations which have been promulgated in connection with the granting of patents, and most people are familiar with that dog-eared book known as the postal regulations, which the clerk at the post-office window thumbs over whenever he is asked a question. By glancing through a copy of these regulations one may obtain some idea of the vast and varied list of functions which a national administrative department is expected to perform. No complete list of all the functions of the ten departments is anywhere to be found, nor would

GENERAL WORK OF THE DEPARTMENTS.

such a tabulation be accurate a few months after it had been compiled, for changes are being made continually.[1]

FUNCTIONS OF A DEPARTMENT HEAD.

It would be quite impossible to give, in a few paragraphs, more than the barest outline of what the head of a department at Washington is supposed to do in the course of his day's work. He names appointees to various junior positions, for Congress has put a good deal of appointing power directly into his hands. Even where this power has been reserved to the President, the advice of the department head is usually sought, especially in the matter of promotions within the department. His individual advice may, in fact, be sought by the President on any matter at any time. The head of a department approves and issues the regulations which have been mentioned in the preceding paragraph. Sometimes, before issuing certain new orders, it is found desirable to hold hearings at which all persons who think themselves affected have an opportunity to present their views. This may consume a good deal of time.

Again, the head of a department has the responsibility for settling disputes arising between his subordinates, or out of their actions. He must deal with all manner of complaints against heads of bureaus and other officials in his department; he hears and determines appeals from their rulings; he listens to senators and congressmen who come with multifarious suggestions, recommendations, and requests for favors. He goes before committees of Congress when called upon, and supervises the preparation of any data that either Congress or the President may request. All important questions of departmental policy come to his desk for decision, and to make an intelligent decision he must wade through piles of memoranda and reports. Finally, he attends a cabinet meeting once a week, receives delegations, makes speeches, goes to official receptions, and gets a little recreation if he can.

POSITIVE CHARACTER OF THESE FUNCTIONS.

Many people think of government in its negative or restraining aspects only. The government, as they see it, is an organization that keeps foreign enemies away, prevents internal disorder, punishes wrongdoing, forbids this or that, and in general stands in the way of the citizen's doing what he would like to do. But this is only one aspect of the government's work, and by no means the most important one. Government is a constructive as well as a restraining factor in the life of the nation. It does not merely prohibit. It promotes. Most of the functions performed by the various

[1] The nearest approach to up-to-date lists is to be found in the *Congressional Directory*, new editions of which appear in January and April; and in the *United States Government Manual*, which is normally revised three times a year.

administrative departments of the national government are of a positive character; they involve activities for the benefit of agriculture, industry, commerce, transportation, banking, labor, public health, education, and other interests which come close to the daily life of every citizen. For this reason one should not think of the national government as something afar off. Its work is vital to the safety, health, prosperity, comfort, and convenience of every household in the land. This will be apparent from even a brief survey of what the ten regular departments are trying to do.

REFERENCES

Important books on the American federal cabinet are H. B. Learned, *The President's Cabinet* (New Haven, 1912), M. L. Hinsdale, *History of the President's Cabinet* (Ann Arbor, 1911), L. M. Short, *The Development of National Administrative Organization in the United States* (Baltimore, 1923), and W. H. Smith, *History of the Cabinet of the United States* (Baltimore, 1925). But attention should also be called to E. S. Corwin, *The President: Office and Powers*, and H. J. Laski, *The American Presidency*, books already listed, but which contain valuable comments on the cabinet system. Valuable information on the actual work of the cabinet as a body may be obtained from the published biographies or related writings of former cabinet members. Among these are Franklin K. Lane, *The Letters of Franklin K. Lane* (Boston, 1922), D. F. Houston, *Eight Years with Wilson's Cabinet* (2 vols., New York, 1926), William C. Redfield, *With Congress and Cabinet* (New York, 1924), *The Diary of Gideon Welles* (3 vols., Boston, 1911), and H. K. Beale (editor), *The Diary of Edward Bates*, in Vol. IV of the Annual Report of the American Historical Association, 1930 (Washington, 1933). Mention may also be made of Joseph W. Alsop, Jr. and Robert Kintner, *Men around the President* (New York, 1939).

See also the references at the close of Chapters XII and XIV.

CHAPTER XIV

NATIONAL ADMINISTRATION: THE DEPARTMENTS

It is a general popular error to suppose the loudest complainers for the public to be the most anxious for its welfare. — *Edmund Burke.*

There are two principal functions which have to be performed by every government. The first is the determination of policies. The second is the function of seeing that these policies are carried out. Policy making is primarily a legislative task; it belongs to Congress. But to some extent it has also come to be a responsibility of the President and the various administrative agencies which are subordinate to him. These executive officials and administrative agencies also have the duty of seeing that the laws are faithfully executed and that policies are carried out, although to some extent this function is also shared by Congress through its right to make investigations. So the line that used to be drawn between the two general functions of policy determining and policy executing has now become rather badly blurred.

LAWMAKING AND ADMINISTRATION.

When Congress passes a law, such as the National Labor Relations Act, and thereby establishes a definite policy, people are likely to think that the issue is settled and the job is done. In reality it is only begun. Weeks may be spent in congressional debates on a measure without settling hundreds of minor questions which are bound to arise under its provisions. Then, when the bill has passed its final stages and received the presidential signature, there comes the task of applying the provisions of the law to the numberless situations that come within its scope. This requires administrative officers, often a great many of them. Congress may adjourn when its members get tired of the Washington heat, but the administrative staff cannot, for its work is continuous. And the quality of its work is of the highest importance; for, no matter how well considered any principle of national policy may be, it will not serve the public well-being unless its execution is entrusted to a competent, impartial and diligent corps of administrators.

LAWMAKING IS ONLY HALF THE STORY.

Administration, then, is a large part of government. For every one legislator in the United States there are at least a hundred administrators.

ADMINISTRATION IS THE OTHER HALF.

Their number has undergone a great increase during the past twenty-five years — an almost unbelievable increase. The reason is to be found in the vast expansion of governmental activities and the increased complexity of the matters with which these activities come into contact. The things which the national government finds itself called upon to do are no longer few and simple, as they were in earlier days. They have become varied, intricate, technical, exacting. Take a list of the administrative agencies at Washington and see what an impressive array they offer, what a wide range they cover, and with what technical matters, far beyond the range of the ordinary citizen's competence, they are expected to deal. Banking and credit, agricultural adjustment, soil erosion, regulation of radio broadcasting, conservation and development of water power, — a full list would occupy many pages of this book. This administrative expansion, moreover, is not a phenomenon of the past few years. It became visible during the closing years of the nineteenth century and has moved at an accelerating pace ever since. Nor is there any reason to think that we have reached the end of it. If governments set out to do more each year (as seems likely), there will be more administrators needed to do it.

There are two ways in which a federal government can administer its laws and execute its policies. One is to devolve this duty upon the states

DIRECT AND INDIRECT ADMINISTRATION.

or other divisions which constitute the federation. Switzerland has used this method to a large extent. When the Swiss central government makes a decision on a matter of general policy, the officials of the several cantons are often directed to carry it out. We are also familiar with this method of delegating authority in the American states, where the state legislatures frequently impose duties on the officials of counties, cities, and towns. For example, they direct the local officers to register births, marriages, and deaths; to enforce state laws relating to traffic on state highways; and to provide jails for the incarceration of persons who are being tried in state courts.

The other plan, which the national government of the United States has largely used, is to administer its own laws and policies through its own administrative officers — men who are appointed by it, are paid from the national treasury, and are responsible directly to Washington. It is true, of course, that there have been notable exceptions to this procedure. For one thing, the national elections have always been conducted by the state authorities. State officers register the voters, compile

the voters' lists, print the ballots; in a word, they conduct the national elections and pay the costs. The Selective Service Act of 1940, moreover, was largely administered by the states under federal supervision. The states were requested to provide the local draft boards, appeal boards, advisory boards, and other personnel; but in this case the national government defrayed the expense involved. Still other examples might be given, but on the whole it remains true that the national government performs its functions directly through its own officials.

CENTRALIZED AND DECENTRALIZED METHODS.

Originally it was thought that the entire administrative work of the national government could be concentrated in a few departments at Washington. And for nearly a hundred years after the establishment of the Union this was successfully done. Congress, whenever the need appeared, was induced to authorize the establishment of a new department or an additional bureau within one of the older departments. Not until the creation of the civil service commission and the interstate commerce commission during the 1880's was nation-wide administrative responsibility of great importance placed permanently in the hands of any official or group of officials outside some one of these regular departments. In the end there were ten of these departments, each headed by a department head, who by usage is a member of the cabinet. These are the state, treasury, war, navy, post office, interior, justice, agriculture, commerce, and labor departments. While somewhat overshadowed in the public imagination by the host of new independent administrative agencies that have mushroomed into the limelight during recent years, these ten regular departments still possess a large and varied list of administrative functions. Their internal organization and broader responsibilities ought, therefore, to be briefly summarized.

I. THE STATE DEPARTMENT

ITS FUNCTIONS:

1. DIPLOMATIC.

The state department is the oldest among the ten regular departments and for that reason the secretary of state ranks as the senior member of the cabinet. But he is not a prime minister in any sense of the term, and has no right to call meetings of the cabinet when the President is ill or absent.[1] The state department deals chiefly with foreign and diplomatic affairs. It is the channel of intercourse between the government of the United States and all foreign governments; likewise it is the medium of communication between the national and state governments in this

[1] See p. 202.

country. It negotiates international agreements and treaties, receives and answers diplomatic communications, gives instructions to American ambassadors abroad, issues passports, conducts correspondence with the governors of the various states, and performs many other functions of a related character. The secretary of state, therefore, is the American minister of interstate and foreign affairs. His dealings with foreign countries are conducted, in the main, through ambassadors, ministers, consuls, and other subordinates who constitute the foreign service.[1]

2. INTERNAL.

The secretary of state functions also in relation to home affairs. He promulgates the laws passed by Congress, he countersigns the President's proclamations, and is the keeper of the great seal. He authenticates warrants for the extradition of fugitives from justice in other countries. Finally, as has been indicated, he is the channel of communication between the federal government and the states. To assist him in the performance of all these functions he has an under secretary (who acts when the secretary of state is absent), six assistant secretaries, a legal adviser, and various other advisers and special assistants, all of whom are appointed by the President.

ITS NUMEROUS OFFICES.

The work of the state department is distributed among some twelve offices, each in charge of a director. Even a cursory inspection of the activities of these twelve offices will give the student an idea of the many additions which have recently been made to the traditional functions of the state department. These activities relate not only to the internal administration and finances of the department, treaties, visas, passports, and the foreign service, but also to problems of international security, foreign economic development, communications, international trade and fiscal policy, cultural relations, information services, and a variety of other matters. Four of the twelve offices have charge of our relations with other parts of the world, that is, European affairs, Far Eastern affairs, Near Eastern and African affairs, and American Republic affairs. Thus it will be seen that the scope of this department's work, in a geographical sense at any rate, reaches far beyond that of any other department. Some notable figures have served the nation as secretaries of state: Thomas Jefferson, James Madison, John Quincy Adams, Henry Clay, Daniel Webster, John C Calhoun, William H. Seward, James G. Blaine, Richard Olney, John Hay, Elihu Root, Charles Evans Hughes, and Cordell Hull. These men have given the secretaryship a fine tradition. In the early days of the Union the post was utilized on several occasions as a stepping-stone to the presi-

[1] For further details on American diplomacy, see Chapter XXXI.

dency, but for over a hundred years no one has moved from the one office to the other.[1]

II. THE TREASURY DEPARTMENT

A WORD OF EXPLANATION.

The department of the treasury is next in order of seniority. In European governments, the chief financial minister has usually possessed the entire initiative in matters relating to fiscal legislation; but such has never been the case in the United States. Most financial measures are brought before Congress by its own committees. The secretary of the treasury frequently tenders advice to these committees and makes recommendations to them; but his recommendations may be (and often are) disregarded by both Houses of Congress. Sometimes the secretary and his staff go to a great deal of pains in preparing data for a new tax law, and such figures prove useful to the legislators; but the tax law in its final form is likely to be a compromise between what the treasury department would like to have and what Congress, heavily influenced by considerations of practical politics, proves willing to give.

CURIOUS POSITION OF THE DEPARTMENT.

It is here that the principle of separation of powers has operated at its worst. The services of the one department which knows most about the financial needs of the government have not been adequately utilized in planning the national revenues or expenditures. Congress has guarded with extreme jealousy its control of the purse, even to the extent of sometimes resenting advice from those treasury officials who are the best equipped to tender it. In no sense, therefore, is the secretary of the treasury responsible for the fiscal policy of the federal government. He exercises a good deal of influence, to be sure; but he has neither the initiative nor the decision in determining how the revenue shall be raised or the money spent.[2] Such matters are, to a considerable extent, the waifs of dark-lantern politics. The extent to which recommendations from the treasury department will carry weight with Congress depends upon the existing relations between the executive and legislative branches of government. Such recommendations count for something under all circumstances, and, when the President controls an ample majority in both Houses of Congress, they usually count for a good deal. Still, the legislators have the

[1] For a discussion of the history and work of this department see Gaillard Hunt, *The Department of State of the United States, Its History and Functions* (New Haven, 1914). For the present organization of the department, which dates from 1944, the student had best consult the most recent edition of the *United States Government Manual*.

[2] See pp. 385–387.

last word in all matters of public finance and when they do not like the recommendations that come from the treasury department they have no hesitation in saying so.

The actual work of the treasury department is extensive and important. It may be grouped under four general heads. First, there is the collection of revenue, especially the supervision of work performed by customs officers and collectors of internal revenue. This includes the duty of issuing all regulations relating to revenue matters and the deciding of appeals which come to the department from the rulings of subordinate officers. Second, the treasury has the custody of the public funds and the paying of all bills for expenditures which have been properly authorized. There is a physical treasury (with strongly guarded vaults) in Washington. For many years there were subtreasuries in nine important cities; but these have been abolished, and the surplus funds of the government are now deposited, for the most part, in the various federal reserve banks.[1] This, of course, does not include the huge amount of gold bullion which the government has accumulated and now keeps in special vaults at Fort Knox, Kentucky. By the provisions of the Social Security Act (1935), the treasury department has been given a greatly increased responsibility as respects the custody and investment of funds. For this statute imposes upon the secretary of the treasury the function of receiving and safely investing in government bonds all the contributions of employers and employees in connection with the old-age pension and employment compensation plans.[2]

WORK OF THE TREASURY DEPARTMENT: 1. COLLECTING THE REVENUE.

2. CUSTODY OF PUBLIC FUNDS, PAYING OF BILLS AND INVESTING.

Third comes the entire supervision of the currency, including control of the mints which coin the money.[3] These functions are apportioned among the comptroller of the currency, the director of the mint, and the director of the bureau of engraving and printing. The treasury is likewise charged with the inspection of national banks and has various powers in relation to the federal reserve system. The issue of government bonds and the borrowing of money, when authorized by Congress, are likewise in the department's charge.[4] Finally, there are a few functions which have nothing to do with finance, but have been placed in the treasury department because they seemed to be as well

3. MINTS AND CURRENCY.

4. NON-FINANCIAL DUTIES.

[1] For an explanation of the federal reserve bank system, see pp. 430–432.
[2] See also pp. 453–458.
[3] For a discussion of currency matters, see pp. 422–426.
[4] See pp. 393–396.

located there as anywhere else. For example, there is the secret service division,[1] the bureau of narcotics, which has the duty of enforcing the federal laws relating to narcotic drugs, and the alcohol tax unit, which handles regulatory functions in connection with the federal liquor laws. The procurement division of the treasury department serves as a central purchasing agency for government supplies. Until a few years ago, the treasury had responsibility for the erection of federal buildings in all parts of the country; but this important function has now been transferred to an independent federal works agency. The coast guard, which took over the duties of the bureau of lighthouses a few years ago, operates within the treasury department in time of peace, but in war or in any other emergency, when so directed by the President, it goes under the supervision of the navy department.

In most other countries the treasury department prepares the budget, but this is not the American practice. In the United States, as will be later explained, this duty is devolved upon an official known as the director of the budget, who has no connection with the treasury department, but is directly responsible to the President. When the budget is ready, moreover, it goes directly to Congress without passing through the hands of the country's chief financial officer, the secretary of the treasury. Similarly, in most other countries, the treasury department is responsible for the auditing of public accounts; whereas in the United States a comptroller general, who is not under treasury control, is given this responsibility.[2]

BUDGET AUTHORITY IS NOT INCLUDED.

Next in rank to the secretary of the treasury is the under secretary. Then there are three assistant secretaries, who are at the heads of sections into which the various divisions and bureaus of the department are grouped. Likewise, there are various other high officials including the legal counsel, the treasurer of the United States, the director of the mint, the comptroller of the currency, the commissioner of the public debt, and the various heads of the internal revenue bureau, customs service, secret service, and so forth. The headship of the treasury department has been held at various times by men of great financial ability, beginning with Alexander Hamilton and including among his successors Albert Gallatin, Salmon P. Chase, and John Sherman.

INTERNAL ORGANIZATION OF THIS DEPARTMENT.

[1] This should not be confused with the federal bureau of investigation (FBI), which is in the department of justice. The secret service is responsible for protecting high personages as well as for the enforcement of federal laws relating to counterfeiting, etc.

[2] See pp. 378–379.

III. THE WAR DEPARTMENT

The war department in the United States is chiefly concerned, of course, with the maintenance and administration of the army. It has to do not only with the enlistment and selection of men for all branches of the service, but with contracts for equipment, supplies, fortifications, the transportation of troops, and the training of officers. Even in time of peace, these functions are of considerable importance; but in time of war, or the approach of war, they become tasks of stupendous magnitude, involving millions of men and billions of dollars. Before the United States launched into its great preparedness program in 1940, the internal organization of this department, with its numerous bureaus, was complicated enough; today it is so elaborate that even a bare outline would fill many pages. The expansion of war department activities has also been stupendous, but a summary of these can best be reserved for a later chapter on national defense.

MILITARY FUNCTIONS.

It should be indicated here, however, that the war department has some important fields of civil authority. One is the construction of certain public works undertaken by the national government, such as the dredging of harbors, the improvement of waterways, or even the construction of railroads and highways — this work being under the immediate supervision of the chief of engineers. In the United States it has always been the custom to make large use of the army's corps of engineers for such special duties. Army engineers made the survey which led to the building of the Union Pacific Railroad. They supervised the laying of the Seattle-Alaska cable, built the first nitrate fixation plant at Muscle Shoals, and constructed the Alcan highway. Even the construction of the Panama Canal was entrusted to them. All the navigable waters of the United States are, in a sense, under the final jurisdiction of the war department. No obstruction to navigation (in the way of bridges or piers, for example) may be erected anywhere without this department's consent.

CIVIL FUNCTIONS.

Another civil function is that of supervising the administration of the Panama Canal Zone. Direct administrative authority in this area is exercised by a governor, who is appointed by the President, but is under the direction of the war department. Unlike the chief European countries, the United States has no department of colonial affairs. Three departments divide the work of supervising the American dependencies. The war department looks after the national interests in the Canal Zone; the interior department, in Alaska, Hawaii, Puerto Rico, the Virgin Islands, and certain Pacific islands situated south of Hawaii; and the

navy department remains in charge of Guam, Samoa, Midway, and other small Pacific islands.[1]

ITS HEAD IS USUALLY A CIVILIAN.

The head of the war department has almost invariably been a civilian, although a few men of military experience, such as Generals Grant and Sherman, have held the post. This is quite in contrast with the practice in some other countries, where high officers of the army are virtually always selected for the post. Both methods have their advantages. An army officer is likely to have a better appreciation of the technical phases of the work, but a civilian may be better qualified to handle such matters as contracts, transportation, and the construction of public works. The secretary of war does not need to know much about military science. He can obtain advice on such matters from his chief of staff, who is assumed to be the best military expert in the land. Moreover, the subordination of the military to the civil branch of the government is something that should be clearly established in any country which desires to be ensured against the *coups d'état* that are facilitated by a different policy.

IV. THE NAVY DEPARTMENT

SCOPE OF THE NAVY DEPARTMENT'S FUNCTIONS.

The functions of the navy department are for the most part implied by its designation. The construction, arming, and distribution of the naval vessels, both regular and auxiliary, the establishment and maintenance of navy yards, the enlistment and training of officers and men, the making of contracts for supplies, and the general administration of the country's armed forces afloat — all these branches of work are included. The department also exercises jurisdiction over the marine corps and the naval aviation forces. Civil functions of the department include the maintenance of a hydrographic office for ocean charting, the supervision of various petroleum reserves, especially in Alaska, and the administration of certain small Pacific islands.

The secretary of the navy, like the secretary of war, is practically always chosen from civil life. He is assisted by an under secretary and two assistant secretaries, but is advised on technical matters by the chief of naval operations, who supervises all naval matters not delegated to specific bureaus. These bureaus handle such matters as ships, yards, and docks, ordnance, engineering supplies, and aeronautics. The bureau of navigation has immediate charge of navy personnel, that is, the procurement, training, distribution and assignment of officers and men.

[1] On the supervision of the Philippines, see p. 537.

V. THE DEPARTMENT OF JUSTICE

The department of justice is the government's law-enforcing agency. The attorney general, who is at its head, serves as the nation's chief legal adviser. The President and the heads of departments call upon him for his advice and opinions with respect to points of law. These *Opinions of the Attorney General* are published after the manner of judicial opinions, and often establish important precedents. They are rendered to the executive branch of the government only, and never to Congress or to legislative committees. The attorney general is also the representative of the federal government in all legal proceedings to which the United States is a party. He and his assistants conduct suits against corporations and individuals who violate the federal laws, but his advisory and administrative duties are now so great that he no longer personally appears in court, even in the Supreme Court, except on rare occasions. Cases before the Supreme Court are usually argued on behalf of the United States by the solicitor general, who is the ranking officer of the department.

THE ATTORNEY GENERAL.

Again, the attorney general and his numerous assistants are given the responsibility of reviewing, as to form and legality, all executive orders before they are issued by the President. They also arrange the settlement of claims against the United States. The bureau of criminal identification, which collects and classifies records relating to known criminals for the use of police authorities throughout the United States, is in the department of justice, which in addition has supervision over all federal penal institutions. The federal bureau of investigation, with its elaborate network of machinery for the detection and arrest of offenders, is also within this department.

SOME DUTIES OF THE OFFICE.

Quite as important is the department's task of supervising the work of the federal district attorneys and marshals throughout the country. There are over eighty of these districts, each with a federal district court. By their requests to Washington for advice or instructions the attorneys in these districts furnish the department with plenty of work. The attorney general and his staff also investigate and report to the President upon all applications for reprieves or pardons. The burden of duties has become so heavy that there are now six or seven assistant attorneys general, to each of whom is assigned some important field of departmental activity. These, in turn, have their own numerous assistants, all of whom are members of the legal profession. In 1940 the immigration and naturalization service was transferred from the department of labor to this department.

SUPERVISORY FUNCTIONS ON A NATION-WIDE SCALE.

For the discharge of its extensive duties in these fields it maintains more than forty offices throughout the country.

VI. THE POST OFFICE DEPARTMENT

The postmaster general is what his title implies. His department has the largest number of employees and hence the greatest range of political patronage, although this has now been greatly diminished by placing most of the positions in the classified service. The United States postal service is the biggest business of its kind in the world, with nearly 45,000 post offices,[1] an annual gross turnover of nearly $970,000,000, and more than 1,000,000 letters per hour dropped into its hands. In conducting this great enterprise, the postmaster general negotiates postal treaties with foreign countries and awards contracts for the transportation of the mails both on land and sea. He also assumes oversight of the air-mail service, the rural mail service, the parcel-post system, the handling of money orders, the postal savings banks, and the sale of United States savings bonds.[2]

SCOPE OF ITS WORK.

An important authority possessed by the postmaster general is that of denying the use of the mails to swindlers, promoters of lotteries, distributors of obscene or seditious publications, and all concerns which may come under the ban for using the service wrongfully. The investigation of such matters is in the hands of postal inspectors. By prosecution for fraudulent use of the mails, it often happens that offenders who have been shrewd enough to escape the clutches of state authorities are brought to account by the postal inspectors and placed on trial in the federal courts.

A FEDERAL POLICEMAN.

The United States postal service is a big business — but does it pay? That question has been the subject of much controversy. The answer to it depends on how you interpret the figures. Usually the post office department reports a deficit. But part of this is due to the enormous amount of matter (official correspondence, printed matter issued by the various administrative agencies, congressmen's mail, etc.) amounting to nearly a billion pieces a year which is carried free.[3] The carrying of first-class mail yields a profit, but most other classes of matter (e.g., newspapers and magazines) are carried at a

POSTAL PROFITS AND DEFICITS.

[1] Forty-odd years ago there were 30,000 more post offices. The increase has been kept within bounds by the growth of rural mail delivery.

[2] See also pp. 474–477.

[3] For figures covering a period of seven years see *Congressional Record*, December 4, 1941, pp. A5778–5779. For the fiscal year 1940, the departments franked 999,138,000 pieces, the post office losing by free carriage $41,533,000. Congressmen franked 45,128,000 pieces, the post office losing $7,217,000.

loss. It is assumed to be good social policy to handle these forms of mail cheaply so that the reading habits of the people may be encouraged. If the postal service were conducted on strictly business principles, it would doubtless contribute greatly to the federal revenue; but there are considerations other than those of profit and loss involved. The results of political pressure, moreover, have been more costly in this department than in any other.

VII. THE DEPARTMENT OF THE INTERIOR

ITS NAME AND ITS FUNCTIONS.

The department of the interior has a title which affords very little clue to its varied functions. In European countries there have been departments called by this name, with such functions as the supervision of local government, including the government of counties, cities, and towns. But the department of the interior at Washington has nothing to do with local government. It has an assortment of functions, so miscellaneous in character that it has sometimes been called the "department of things in general." For example, the interior department has charge of Indian affairs, public lands, the regulation of fisheries, the conservation of natural resources, national parks and monuments, the geological survey, the promotion of safety in mines, the protection of migratory birds and wild life in general, the reclamation of waste lands including irrigation, flood control, and power projects (such as Boulder Dam and Grand Coulee), the administration of the federal laws relating to the conservation of oil, as well as relations with Alaska, Hawaii, Puerto Rico, and the Virgin Islands. The office of education was also sheltered in this mosaic department until 1939 when it was transferred with all its functions to the federal security agency.[1]

A DIFFICULT DEPARTMENT TO MANAGE.

The headship of all these bureaus and divisions, from Indian affairs to migratory birds, would seem to require a man of uncommon versatility. Not only that, but he must be an adroit and cautious administrator; for no other department is so besieged with people who have their own ends to serve. Oil leases and timber leases on government lands, for example, have always proved slippery things to handle. Indian affairs are also a dependable source of embarrassment, for the poor Indian has so many paleface friends on the one hand and exploiters on the other. By both sides, the department is beset with protests and plans. Numerous sections of the country want swamp lands reclaimed, dams built on rivers, desert lands irrigated, and

[1] See p. 239.

other waste territory made usable at government expense. Then Hawaii, that picturesque little melting pot of the mid-Pacific, sets its varied problems at the department's door. Puerto Rico and Alaska, which represent America's dominion over palm and pine, do the same. The Philippine Islands, as will be seen later, have been given a position of semi-independence; but the United States continues to exercise an influence over some matters there and is represented in Manila by a high commissioner, who has a rating on the rolls of the interior department. If a statesman considered his own peace of mind, the department of the interior is the last one that he would choose.

But much of the secretary's work is devolved upon subordinates, most of whom are specialists in their several fields. Chief among these are the under secretary of the interior, two assistant secretaries, and five others who are called "assistants to the secretary." Then come more than a dozen directors of bureaus, along with several commissioners, administrators, and other officials who have important work under their supervision. In the number of its personnel this is one of the largest among Washington departments.

VIII. THE DEPARTMENT OF AGRICULTURE

VARIED FUNCTIONS WITH A COMMON TIE-UP.

The secretary of agriculture has also acquired a list of assorted responsibilities, but all of them have to do, in one way or another, with the winning of man's livelihood from the soil. The department combines the functions of a research institution and a service agency. They include the maintenance of agricultural experiment stations and of various other institutions for the study of soils, plants, and livestock, the distribution of seed, the establishment of cattle quarantines, the inspection of meats and other food products, the making of scientific studies relating to irrigation and drainage, farm engineering and farm housing, the issue of agricultural bulletins dealing with all manner of farm problems, the supervision of the weather bureau, the management of the forest service, the compilation of crop reports and crop forecasts, the management of the crusade against noxious insects, the enforcement of the laws relating to grain exchanges, the insurance of farm crops, the marketing of surplus farm products, and many other things of an allied nature. The agricultural adjustment administration (AAA), which has for its main objective the restoration of farm buying power, is under the jurisdiction of the secretary of agriculture, and so is the farm credit administration, which provides a credit system for agriculture.[1] A considerable part of the

[1] See pp. 433–434.

department's work is of an educational character, carried on through its extension service and its office of information. If one desires an impressive illustration of the government's "constructive" work, there is none better than this. The department of agriculture, through the work of its various bureaus, offices, and services, has enormously increased the productivity of the land. Its work is supplemented by the work of the states, most of which maintain their own departments of agriculture.

IX. THE DEPARTMENT OF COMMERCE

In 1903 Congress created a department of commerce and labor, but ten years later divided it into two departments. The department of commerce has expanded steadily; it is now a scientific, statistical, and analytical body which is concerned in a general way with the promotion of foreign and domestic trade. Since trade depends on industry, however, it is sometimes said that the department of commerce finds itself concerned with "all matters affecting economic activity." One of the most important divisions is the bureau of foreign and domestic commerce, which has to do with the study and promotion of trade both at home and abroad. It is the basic economic bureau of the government in normal times, acting as the liaison agency between government and the business world. To facilitate its work the department maintains offices in the principal American cities, and these local offices keep contact with chambers of commerce, boards of trade, and other trade-promotion bodies. Other bureaus are concerned with the licensing and inspection of steamboats, the maintenance of lighthouses and other aids to navigation, as well as the making of coast and geodetic surveys. Likewise, the department of commerce includes the bureau of standards, which determines by careful study the standard weights and measures, particularly those in respect to which great precision is essential. It is the largest testing laboratory in the world, with a staff of nearly one thousand, and in recent years has extended its work far beyond the standardizing of weights and measures. Today it is a great institution of research in physical science and technology.

ITS ACTIVITIES.

The patent office is included within the department of commerce and performs a function of far-reaching importance. As its name implies, it is principally concerned with the granting of patents, but it also has the duty of registering trade-marks and labels used on merchandise which enters into foreign or interstate commerce.

PATENTS.

The regulation of civil aeronautics comes within the purview of the department of commerce because the administrator of civil aeronautics and the civil aeronautics board are placed within this department.

Their function is to encourage the development of air commerce by the establishment of airways, landing fields, and other aids to air navigation; likewise, to supervise and control the protection of air traffic by making regulations and by granting licenses. They are the principal authorities with whom all owners and operators of civilian aircraft have to deal.

AERONAUTICS.

Finally, there is the bureau of the census. It has the responsibility of making the nation-wide census enumeration every ten years. In earlier days this bureau virtually went out of existence when a decennial count had been completed and was not revived until the approach of another census date. During more recent years, however, the work of enumerating, classifying, and interpreting the data — especially the figures relating to industry — has become a continuous job. The bureau now functions on a permanent basis, but adds greatly to its staff in the decennial years when the house-to-house enumeration is being taken.

THE CENSUS.

X. THE DEPARTMENT OF LABOR

The department of labor was originally created for the primary purpose of acquiring and disseminating useful information on subjects connected with labor, as a means of promoting the welfare of workers. But its functions have been considerably widened. For example, the wage and hour division enforces the provisions of the Fair Labor Standards Act of 1938 with reference to adults; the children's bureau, with reference to child labor. The public contracts division administers a law of 1936 which deals with hours, wages, and safety in the terms of government supply contracts. Likewise within the department is the United States conciliation service, which seeks to settle labor disputes by peaceful agreement.[1] Through its bureau of labor statistics the department collects data and publishes, at regular intervals, various bulletins on labor conditions in the United States and other countries. Included in the department of labor are a women's bureau and a children's bureau, to which are entrusted the administration of the laws relating to the employment of women and minors in areas under federal control. Similarly the department is vested with the duty of administering the services relating to the welfare and health of women and children which the social security laws provide.[2] In a word, this department seeks to do for the interests of labor what other departments have done for agriculture and commerce respectively.

[1] See also p. 448.

[2] For a discussion of the social security system, see pp. 454–458.

THE SYSTEM IN GENERAL

SUMMARY.

These are the ten regular departments. They are not arranged on any logical, orderly, or systematic basis. They have grown up, one by one, to meet new conditions. When a new piece of administrative machinery is required, it is put wherever seems most convenient at the time — in one of the regular departments or outside the regular departments altogether. Then, when a department becomes overcrowded, or when some other good reason appears, one or more of its bureaus or divisions are shifted somewhere else. Under the circumstances, it is not surprising that there is confusion and overlapping. Everyone in Washington is aware of this. From time to time, it has been proposed to give the organization a general overhauling, and a few years ago Congress gave the President authority to shift things about by executive order. By virtue of this power he has made a number of important changes, by shuffling bureaus and divisions from one department to another. But there has been no thorough overhauling of the whole administrative machine, nor is such drastic action likely to be taken because it would stir up a great deal of opposition from those public officials who might be adversely affected.

Meanwhile, there has been some clamor for the establishment of additional departments — a department of public works, of public health, of education, of public welfare, of highways, of conservation. Good arguments can be advanced in behalf of all these proposals, but there is the serious objection that by creating several new regular departments the cabinet would be enlarged to a point where it might lose much of its value as an informal consultative group. So the recent practice has been to provide new administrative machinery by establishing boards, bureaus or offices entirely outside the purview of the ten regular departments. Some of these have now become quite as important, in the administration of federal affairs, as are the departments themselves. For example, the national labor relations board, an independent agency, is hardly inferior to the department of labor in the scope and importance of its work. And under wartime conditions the office of price administration outranked the department of commerce in the breadth of its operations.

It has been suggested that a greater degree of harmony and cooperation between the executive and legislative branches of the national government would be secured if members of the cabinet were allowed to sit and speak (although not to vote) in both Houses of Congress; and resolutions to the same effect have been introduced into Congress on

several occasions, but have never found much favor. President Taft made such a proposal in his last annual message.[1] Congress, of course, has an undoubted right to accord this privilege to members of the cabinet, because there is a provision in the Constitution of the United States which authorizes both Houses to make their own rules of procedure, including the determination of who shall have the right to speak and when. For many years, under these rules, delegates from the territories (Alaska and Hawaii) have been allowed to sit in the House of Representatives and to speak there, although having no right to vote. The Constitution excludes persons "holding any office under the United States" from membership in either House during their continuance in office; but a member of the cabinet, by merely taking part in the debates, would not become a member of Congress any more than the chaplain or the clerk, both of whom sit and speak within the legislative halls whenever it is in order for them to do so. A member of the cabinet, if merely given the right to sit and speak in Congress, would have no vote, no official term, no privilege of immunity from arrest, none of the constitutional attributes of a congressman.

SHOULD MEMBERS OF THE CABINET SIT IN CONGRESS?

Conceding, however, that Congress has the power to admit members of the cabinet to all its sessions, would it be expedient to do so? This question has been many times discussed, and there are two sides to it. On the one hand, it has been argued that Congress in this way could obtain more useful and more exact information than it now obtains through roundabout channels — which is probably true. It is further contended that the change would virtually compel the President to choose as members of the cabinet men of real capacity, who would have to become extremely conversant with the affairs of their several departments because no incompetent head of a department could keep from demonstrating his incapacity if he were expected to take an active part in the deliberations of Congress day by day. He would be questioned on the floor, forced to defend his administrative policies, and criticized for his actions. To be sure, there might be some embarrassment in this procedure for the reason that the actions of every department head are, in the last analysis, the actions of the President, and the President is not responsible to Congress.

MERITS OF THE IDEA.

On the other hand, it should be borne in mind that by placing ten cabinet members on the floor of Congress the executive branch of the government would acquire a greatly increased influence upon congres-

[1] *Congressional Record*, December 19, 1912; *Messages and Papers of the Presidents*, Vol. XVI, pp. 7811–7813.

sional deliberations, even though this group would have no vote in either House. They would get the newspaper headlines more frequently than regular members of Congress could hope to do. Members of the cabinet would then be selected by the President (some of them at least), not primarily for their administrative ability, but because of their oratorical powers and their personal influence in the Senate and the House. A premium might well be placed on the choice of men who had served in Congress and had acquired a strong following there. The President would then have, on the floor of both Houses, ten valiant champions of the administration who would be privileged to serve as his super-lobbyists, both on the floor and off it. Such an arrangement would undoubtedly increase his strength in promoting or opposing legislation. Men who had not been elected by the people would then be found to be exerting a considerable direct influence upon the making of laws and the voting of money, which appointive officials are not supposed to do. Moreover, if heads of the ten regular departments are to be given the sit-and-speak privilege, why stop there? Some heads of independent governmental agencies — the director of the budget, for example — would seem to have an equally strong or even stronger claim.

OBJECTIONS TO IT.

And in any case, those who serve as the President's chief administrative subordinates, whether in the cabinet or out of it, have already quite enough to do without daily participation in congressional debates. If they had to spend much of their time in the legislative chambers, they could not hope to gain adequate familiarity with the problems which come to their own office desks. It hardly avails to say that members of the ministry in some other countries (in Great Britain and the British Dominions, for example) have found it possible to take a very active part in parliamentary debates and also serve as competent heads of administrative departments. These ministers, as a matter of fact, leave a large part of their administrative responsibilities, with virtual finality, to their chief subordinates. That is what would eventually happen in the United States if members of the cabinet were expected to spend any large portion of their time in attendance at congressional sessions. Possibly such a development would not be at all harmful if the administrative subordinates were sufficiently competent and experienced.

A favorite theme of writers in the field of comparative government has been the series of contrasts between the two great systems of administrative responsibility — the British and the American — with direct responsibility to the House of Commons in one case and to the President in the other. The difference is so great

A FINAL COMPARISON.

and fundamental that its ramifications carry through the two political systems from top to bottom. Each plan has its advantages, offset by corresponding weaknesses. No thoughtful student of government would care to affirm that either plan has an advantage over the other under all circumstances and in all countries. Both have served a good purpose, each in its own political orbit, and the adaptation of the agent to its environment is as essential in the body politic as in living organisms. The British plan makes for concentration of responsibility, firm legislative leadership, and forthrightness of public policy. But if the American system shows its weakness in the diffusion of responsibility for lawmaking and in the defective cooperation which it provides between the two great arms of government, it has an offsetting merit in the protection which it affords against the undue gravitation of power into a few hands.

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The attention of students is especially called to the important work of the President's Committee on Administrative Management, which foreshadowed

many of the recent changes in federal administrative organization. Recommendations and special studies of this committee may be found in its *Administrative Management in the Government of the United States* (Washington, 1937) and the *Report of the Committee with Studies of Administrative Management in the Federal Government* (Washington, 1937). Changes in the organization of the federal administration are noted in summary articles which appear from time to time in the *American Political Science Review*. Another publication which will help the student to keep abreast of administrative changes is the *United States Government Manual*, issued three times a year. For additional references on various phases of this general subject reference may be made to Sarah Greer, *A Bibliography of Public Administration* (2nd edition, Part I, New York, 1933).

CHAPTER XV

THE INDEPENDENT AND EMERGENCY ADMINISTRATIVE SERVICES

Nothing is so galling to a people as a paternal, or, in other words, a meddling government, a government which tells them what to read, and say, and eat, and drink, and wear. — *Macaulay.*

Until about fifty years ago, the entire administrative work of the national government was performed by the regular executive departments. Even at that, some of these departments were far from being overloaded. But during the past half century the general concept of governmental functions has undergone a steady change. The idea that a government should govern best by governing least has given way to the doctrine that it should actively intervene to control and regulate the free play of economic and social forces whenever these forces seem to be in need of constraint. In other words, it has become our generally accepted political philosophy that the national government should keep a regulating hand on transportation, communication, labor relations, wages and hours in great industries, banking, credit, the issue of securities, the overproduction of crops, the price of silver, and a great many other things. In keeping with this altered concept, there has developed a steady expansion of governmental activities. And this, in turn, has created new administrative duties which, although to some extent absorbed by the ten regular departments, have been for the most part turned over to new independent agencies outside the cabinet circle.

BUREAUS AND BOARDS OUTSIDE THE REGULAR DEPARTMENTS.

A variety of reasons, historical, political, and personal, have dictated the setting up of these numerous commissions, boards, "administrations," and offices as independent agencies. In some instances there was a justifiable desire to provide bipartisan representation (as in the case of the civil service commission), which could not be done if the work were placed in a department headed by one person. In other instances there seemed to be an urgent need for continuity, which could only be had by so constituting a

REASONS FOR THEIR EXISTENCE.

board that its members would retire one at a time. In still other cases the creation of an independent agency was dictated by the fact that no one of the regular departments seemed adequately equipped to undertake the new duties. Finally, some of the new services were called into existence by emergency conditions which, it was expected, would be temporary — in which case the agency would soon go out of existence — the war relocation administration, for example. At any rate, the system of national administration has expanded at a rapid pace in recent years by merely adding one piece of machinery to another until the result is a great mechanism which almost defies description.

THE CHANGING ADMINISTRATIVE SCENE.

A complete enumeration of these independent and emergency administrative services, with a detailed statement of their functions, would fill an entire volume. Even then it would be inaccurate within a few weeks because of the almost daily changes which are being made in the organization of the different offices and in the distribution of duties among them. Most of these changes do not require action by Congress: they can be made by executive order. In 1939 Congress gave the President a wide range of authority to combine, coordinate, or abolish administrative agencies; and this authority has been freely used, especially with respect to those which have been set up during recent years as part of the recovery and rearmament programs.[1]

TWO CLASSES OF INDEPENDENT AGENCIES: PERMANENT AND EMERGENCY.

Today there are almost a hundred commissions, boards, bureaus, divisions, offices, services, "administrations" and "authorities" functioning outside the ten regular departments. As a preliminary classification they may be grouped into two categories: those which have been established as part of the nation's permanent administrative equipment, and those which were created to deal with problems arising out of an economic depression or war emergency. The latter were not intended to be permanent. Some have already succumbed and others are expected to do so under laws which automatically expire at a given date. But it is an axiom of practical politics that governmental agencies always try to perpetuate themselves and are never ready to give up when the conditions which called them into existence have passed. They seek, and

[1] The procedure of war obscured the process of consolidation. Until 1946 at least half of the semiautonomous agencies functioning outside the ten departments related to some phase of the war effort, having been set up as circumstances demanded them. Yet since the first inauguration of President Roosevelt, and particularly since the Reorganization Act of 1939, many services have been abolished, merged, or transferred to the departments. The actual number of such services falls just short of 300. Roughly speaking, 30 per cent have been abolished; 20 per cent, transferred.

usually find, reasons to justify their continuance. If there are no valid reasons, they will create some. Nothing is more tenacious of life than a government bureau. It is a safe prediction, therefore, that some of these emergency agencies, perhaps many of them, will become permanently embedded in the national administrative system.

I. THE PERMANENT REGULATORY AGENCIES

THE PERMANENT REGULATORY AGENCIES.

Among the permanent administrative agencies outside the ten departments of the cabinet, some of the most important are the great regulatory boards which Congress has established at various times to insure that its measures for the control of transportation, communication, industry, and finance are carried into effect. These permanent agencies exist for the simple reason that laws which are intended to regulate things do not achieve their purpose unless some official or body of officials is given the direct responsibility for enforcing them. They exist for the further reason that successful regulation requires a resiliency which statutes are themselves unable to provide. To secure flexibility in the administration of a statute, it is necessary to endow some administrative agency with power to use discretion within the general provisions of the law. And the exercise of such discretion can be more safely lodged in the hands of a board than in those of a single administrative officer.

(A) THE INTERSTATE COMMERCE COMMISSION

OLDEST OF THE REGULATORY BOARDS.

Oldest among these permanent regulatory boards is the interstate commerce commission. It was established in 1887 to supervise common carriers transporting passengers or property "wholly by railroad or partly by railroad and partly by water" when both are used, for continuous carriage, under a common control. The original powers of the commission, however, have been greatly extended by successive acts of Congress during the past forty years. Today the I C C is charged with the general duty of seeing that all interstate railroads and other "common carriers" maintain reasonable rates and give adequate service.[1] The commission is now composed of eleven members, each appointed for a seven-year term by

[1] The Hepburn Act of 1906 not only provided means for the enforcement of the commission's orders, but also extended its jurisdiction to include pipe lines (except those carrying water or gas), express companies, and sleeping-car companies. More recently its jurisdiction has been further extended to include motor carriers (1935), water carriers operating on inland and coastal waters (1940), and freight forwarders (1942). But its power to regulate interstate telephone, telegraph, and cable companies was transferred, in 1934, to the new federal communications commission.

the President with the consent of the Senate. From its own membership the commission elects a chairman who serves for one year. It also appoints a secretary, who serves as the agency's executive officer and in addition employs a large staff of engineers, accountants, examiners, attorneys, special agents and other subordinate officials. Because of the large amount of work which it has to do, the commission has created five divisions, each having at least three members; and each of these divisions may make rulings (subject to review by the commission) which have the same force and effect as if made by the commission itself. The work of the interstate commerce commission is quasi-judicial in its nature, for it largely concerns the adjudication of controversies between transportation companies and shippers of merchandise. The commission has become the right hand of Congress in the exercise of that body's constitutional power to "regulate commerce . . . among the several states." [1]

(b) THE FEDERAL TRADE COMMISSION

Another important board which exercises authority in the domain of commerce and industry is the federal trade commission, established in 1914. This commission took over the work formerly handled by the bureau of corporations in the department of commerce, but acquired from Congress a wide range of authority in addition. It now consists of five members appointed by the President, with the approval of the Senate, for a seven-year term. In general the commission may be said to have a threefold purpose: (1) to promote free and fair competition; (2) to safeguard the health of consumers by outlawing the misrepresentation or false advertisement of food, drugs, and other commodities; and (3) to publish factual data as a basis for remedial legislation. Its original powers were directed against the growth of trusts and monopolies, against such unfair methods of competition as price-fixing agreements, boycotts, and combinations in restraint of trade. These powers have been greatly extended by statute during the past decade. They now apply, for example, to unfair or deceptive practices regarding food, drugs, cosmetics, and wool products. But they do not apply to common carriers, air carriers, telegraph, telephone, and radio companies, and banks, these being supervised by other federal authorities.[2] The commission may investigate the organization and conduct of any firm, except common

ORIGIN, ORGANIZATION, AND PRINCIPAL FUNCTIONS.

[1] See also the discussion of the commerce power of Congress, pp. 399–419.

[2] Common carriers, by the interstate commerce commission; air carriers, by the civil aeronautics board; telegraph, telephone, and radio companies, by the federal communications commission; and banks, by the comptroller of the currency.

carriers and banks, that engages in commerce. When it finds on investigation that any unfair trade practice is being pursued, it issues a cease and desist order.[1] These orders, if need be, are enforced by the federal circuit courts of appeals, which also have power to set aside or modify the orders if they find that the commission has overstepped its legal authority.[2]

(c) THE FEDERAL COMMUNICATIONS COMMISSION

ORGANIZATION AND POWERS.

The federal communications commission was created in 1934. Its duty is to regulate interstate and foreign communication by wire or radio. Prior to 1934, this function was divided between the interstate commerce commission (which had authority over telegraph, telephone, and cable companies) and a federal radio commission. The new commission combines both these jurisdictions with a view to making the system of regulation more effective. It has a membership of seven, appointed by the President with senatorial concurrence, one of its members being designated as chairman. The federal communications commission has decentralized its routine work among more than twenty district offices, which are located at various points throughout the United States.

THE REGULATION OF RADIO BROADCASTING.

A large part of the commission's responsibility, at the present time, is connected with the licensing of broadcasting stations, the allocation of wave lengths to them, the determination of the hours in which they may operate, and the placing of limitations upon the amount of sending power that they may use. The communications commission may revoke a license in any case where it finds that a station is not being operated in the public interest. This gives it a measure of authority over broadcasting which might readily be widened into a general censorship. Thus far, however, the commission has refused to exercise any close surveillance over radio programs, although it has occasionally ordered the revocation of licenses for such offenses as the use of scurrilous language and the broadcasting of fraudulent advertising. All radio stations, of whatever capacity, are subject to federal licensing on the theory that they are engaged "in interstate commerce," although it is not commerce but entertainment which most of their programs feature. Even the so-called local stations are held to be interstate in their scope, for potentially their waves go across state boundaries.

The phenomenal growth of radio has made regulation difficult.

[1] See also pp. 442–444.

[2] For an explanation of these courts, see pp. 582–583.

CONTROVERSIES DURING THE PAST DECADE.

Thirty years ago, in the First World War, the sending of messages by spark wireless in the dot-and-dash code seemed miraculous. Broadcasting came later and soon reached vast proportions. This lusty and self-willed youngster has been inclined to resent control and to denounce the commission as lacking in sympathetic appreciation of the problems of youth. Controversy and conflict have marked the relations between the broadcasters and the commission, especially as the latter, guarding against antisocial tendencies, has made war upon monopoly and sought to harmonize private profit with public welfare. During the Second World War, the activities of the commission were largely diverted into new channels. Approximately three fourths of its time and income went to national defense. It operated radio intelligence centers and monitoring stations. It intercepted messages of vital concern to the armed forces, located the source of suspicious signals, and ascertained the citizenship of all radio operators.

(d) THE SECURITIES AND EXCHANGE COMMISSION

NEW SECURITY ISSUES.

A newcomer in the field of federal regulation is the securities and exchange commission, established in 1934. Its five members are presidential appointees, approved by the Senate; they serve for five years, one member retiring annually. The commission was set up to administer the provisions of statutes which Congress enacted during 1933–1934, in its endeavor to curb various abuses which had become widely prevalent in the flotation and marketing of securities.[1] To this end, laws require that all new issues of securities, except a few exempted ones, must be submitted to the commission before being offered for sale in interstate commerce or through the mails. In connection with this submission, a registration statement must be filed giving all essential information, for the truthfulness of which the promoters are responsible. The commission does not pass on the intrinsic value of any securities which it approves for issue, but merely requires the full disclosure of such facts as will enable an intelligent investor to use his own judgment.

REGULATION OF STOCK EXCHANGES.

The commission also regulates the stock exchanges. Its approval of their organization and bylaws is required. Likewise, all securities listed on such exchanges must be registered with the commission, and in this connection the commission may require a full disclosure of financial conditions in those corporations whose securities are listed. Its duty is also to prevent the making

[1] The Securities Act of 1933 and the Securities Exchange Act of 1934. The authority of the commission was increased, in the years 1935–1940, by four other statutes.

of unfair profits in stock-market manipulations by "insiders" who acquire knowledge superior to that of the investing public. The practice of buying stocks on margin is likewise subject to regulation, but rules relating to the amount of such margins are made by the federal reserve board. The general purpose of all this regulation is to provide investors with adequate information about securities so that they may be enabled to form intelligent opinions concerning the true value of stocks and bonds; likewise, to protect the public against fraud by insisting that stock exchanges shall be unmanipulated and honestly conducted.

By the Public Utility Holding Companies Act of 1935, the securities and exchange commission was also given powers in relation to all public utility holding companies which are engaged in interstate commerce or which make use of the mails in connection with their business. As will be more fully explained later, the commission has power to require the registration of all such concerns and is vested with the function of bringing about a simplification of public utility corporate organization in order that the interests of both consumers and investors may be properly safeguarded.[1]

JURISDICTION OVER PUBLIC UTILITY COMPANIES.

(E) THE FEDERAL SECURITY AGENCY

The federal security agency was established in 1939 by grouping together various boards, offices, and services under the supervision of an administrator. More particularly it includes the social security board which was created a few years earlier to administer the federal social security laws relating to old-age pensions and unemployment benefits, as well as to administer aid to dependent children and the needy blind through federal grants to the states. But the federal security agency also includes the food and drugs administration (which was taken over from the department of agriculture), the public health service, the office of education, and the United States employment service. It does not have the handling of funds which are accumulated from the contributions of employers and employees for the payment of old-age pensions. The administration of the social security funds is devolved upon a board of trustees of the federal old-age and survivors' trust fund of which the secretary of the treasury is the "managing" trustee.

OLD-AGE PENSIONS AND OTHER SOCIAL SECURITY MATTERS.

(F) THE FEDERAL POWER COMMISSION

Another regulatory board of a permanent character is the federal power commission. This body now consists of five commissioners ap-

[1] See pp. 414–416.

pointed by the President and Senate, and its chief function is to administer the provisions of the Federal Water Power Act and other measures which Congress has passed for the conservation of the country's water-power resources. These statutes also represent a desire to promote the improvement of navigation and its development in streams subject to federal jurisdiction, while at the same time protecting power users against unreasonable rates. It should be explained that all navigable streams, wherever situated in the United States, are subject to this control by the federal government. In order to protect the consuming public and to promote the financial stability of water-power enterprises which have been licensed by the national government, the commission is authorized to regulate their rates and conditions of service whenever they are engaged in interstate business, or in business wholly within a state if the state has no regulatory agency of its own.

ITS ORGANIZATION AND FUNCTIONS.

It is also provided by the federal laws that the United States, or any state or municipality designated by it, shall have the right to take over any private water-power enterprise at the expiry of its license term, upon payment of the net investment which must not exceed the fair value at the time of the taking over. To make this "recapture" provision effective, the commission requires all licensees to keep an approved system of accounts, and each year it figures the net investment currently. During the Second World War, the commission was charged with the additional task of stepping up the country's power facilities to meet the needs of the war emergency and of protecting them against hostile acts.

II. THE PERMANENT SERVICE AGENCIES

(A) THE UNITED STATES TARIFF COMMISSION

Then there are various boards, bureaus, and offices with functions which are not regulatory in the usual sense, but rather serve to facilitate the administration of various important federal laws. The tariff commission is one of these. A quarter of a century or more ago, when the tariff was a leading issue in American politics, Congress authorized the establishment of this board, which was subsequently given additional powers and considerably reorganized in 1930. It is now made up of a chairman, a vice-chairman, and four other members, all of whom are appointed by the President and Senate in the usual way for a six-year term, with one term expiring each year. Not more than half the membership may be drawn from one political party. The commission's primary function

HISTORY, ORGANIZATION, PURPOSES, AND POWERS.

is to investigate and report on tariff matters in general and to make such special studies as the President or the appropriate committees of Congress may require. For example, the staff of the commission compiles classifications of imported articles which are comparable with those of American production, and ascertains the import costs of such commodities.

Likewise the tariff commission investigates the difference between the production costs of commodities in the United States and abroad, using these investigations as the basis of recommendations to the President in connection with the "flexible clause" of the American tariff.[1] The commission, finally, serves as a source of information and advice in connection with the negotiation of foreign trade agreements, insofar as these involve tariff modifications.

ITS FUNCTION IN RELATION TO THE "FLEXIBLE CLAUSE."

It is scarcely necessary to point out that the tariff commission does not frame the tariff. That function belongs to Congress, which is supposed to utilize the commission's knowledge of the subject, but has never done this to any large extent. Tariff schedules have usually been framed by congressional committees, with more reference to political pressure than to expert advice concerning economic requirements. And in any event, the tariff, as a political issue, has dropped far into the background during the past twenty years. One may read the newspaper headlines day after day without ever seeing a mention of it. Most Americans, apart from importers of goods, have almost forgotten that there is a tariff. The reason for all this, is the general dislocation of international trade which has resulted from wars, economic depressions, and the use of the quota system by totalitarian states.[2]

(B) THE CIVIL SERVICE COMMISSION

The civil service commission is one of the oldest among the independent boards, having been established more than sixty years ago. Its chief function is to administer the national laws relating to appointments in the classified service.[3] More specifically, it makes the rules relating to civil service competitions and supervises the holding of the examinations. The commission keeps a file of service records covering all persons in the classified service and passes upon the qualifications of all such persons who are proposed for transfer from one classified position to another. The scope of the commission's work may be judged from the fact that at the end of 1940, when the executive branch of the civil service included over 1,119,000 persons,

ADMINISTERING THE MERIT SYSTEM.

[1] See pp. 404–405. [2] For an explanation see pp. 405–406. [3] See pp. 258–263.

73 per cent were covered by the merit system.[1] After the outbreak of war, the percentage declined considerably. Those who are exempt from the merit system — mostly employees in the existing emergency services — now constitute the major element. They remain exempt for two reasons: first, because these emergency services had to recruit their employees hurriedly, without waiting for eligible lists; and second, because it is not desirable to have such employees on permanent status when the emergency is past.

(c) THE BUREAU OF THE BUDGET

Until a few years ago, the bureau of the budget was officially attached to the treasury department, but functioned independently. Now its independence is complete, as it has been placed under the immediate direction of the President. It is headed by a director whom he appoints. This director's general duty is to receive from the heads of all administrative departments and other agencies their estimates of appropriations needed for the coming fiscal year. These, in consultation with the President, are then revised, reduced, or increased as may seem advisable and combined into a provisional budget along with estimates of national revenues.[2] In doing his work, the director of the budget is responsible to no one but the President, and can be overruled by him alone. But after the budget has been transmitted to Congress, the latter has a free hand to do what it pleases with the figures.

(d) AGENCIES FOR THE CONTROL OF BANKING AND CREDIT

As will be explained in a subsequent chapter, the American system of banking and credit is a very complicated affair. Even bankers of long experience do not fully understand it. There are more banks, and of more varieties, than in any other country. The supervision of these numerous and varied institutions has required the setting up of regulatory agencies in both the national and state governments. Among the former the comptroller of the currency is an important figure with the function of directly supervising all the national banks — that is, all banks that have their charters from the national government. Then there is a board of governors of the federal reserve system, which includes seven members appointed by the President with the approval of the Senate. In selecting these seven members, the President is required to

[1] At the close of the Hoover administration, the percentage was 80. During the first four years of the New Deal, it sank to 63; during the next four years, it rose to 73; and under the emergency of war, as the total passed 3,000,000, it sank once more with great rapidity.

[2] For a discussion of budgetary procedure in Congress see pp. 386–392.

afford fair representation to the financial, agricultural, industrial, and commercial interests as well as to the various geographical divisions of the country.[1] Likewise, there is a farm credit administration, which provides credit for agriculture through the federal land banks, joint-stock land banks, intermediate credit banks, and the federal farm mortgage corporation, which aids in financing the lending operations of the federal land banks. The farm credit administration consists of a governor, three deputy governors, and four commissioners. Since 1939 it has been attached to the department of agriculture.

FARM CREDIT ADMINISTRATION.

The federal deposit insurance corporation was created on the heels of the banking emergency of 1933, but is being retained as a permanent federal instrumentality. Its board of directors consists of three members, including the comptroller of the currency. The chief function of the F D I C is to insure the deposits of all banks which are entitled to the privilege of deposit insurance under the federal laws. Incidentally to this function, the corporation may act as receiver for closed banks or may operate new national banks for a limited time in order to make available to depositors in closed banks the insured amount of their deposits.[2]

THE FEDERAL DEPOSIT INSURANCE CORPORATION.

The foregoing do not exhaust the list of federal agencies which have to do with banking. There are national authorities which supervise the hundreds of federal loan and savings institutions throughout the country; others control the import-export bank which has been established to facilitate foreign trade; while others, again, have supervision over loans made by private banks with a government guarantee. A federal loan agency headed by an administrator is responsible for coordinating the work of all these various authorities.

(E) MISCELLANEOUS INDEPENDENT AGENCIES

Adding to the perplexities of anyone who tries to thread his way through the mystic maze of Washington officialdom are numerous independent agencies of a permanent character which do not lend themselves to any grouping. The duties of each, however, are fairly well indicated by its title. For example, there is the Library of Congress which is now the largest depositary of books in the United States, and probably the largest in the world. With its collection of nearly nine and a half million books, pamphlets, periodicals, maps, manuscripts, engravings, and other items, this library is

THE LIBRARY OF CONGRESS.

[1] Cf. Chapter XXVI. [2] See also pp. 432–433.

administered as a separate agency under a librarian who is appointed by the President. Originally established for the convenience of Congress, the institution has become a national library which attracts research scholars from all parts of the country. Incidentally, it has charge of the granting of copyrights.

THE GOVERNMENT PRINTING OFFICE.

The national government does all its own printing, maintaining for that purpose the world's largest printing plant. All bills introduced into Congress, all reports and journals, and the daily issues of the *Congressional Record* are printed by this establishment. The *Record* contains a stenographic report of proceedings in both Houses. The post office department, however, is the largest customer of the government printing office for post cards, money order applications, change-of-address cards, etc., although postage stamps are made by another government agency, the bureau of engraving. Other departments, together with the various independent agencies and emergency services, also make heavy demands on the government printing office, which provides them not only with printed material but with blank paper, inks, and various other supplies. The office is headed by the public printer whose appointment comes directly from the President with the approval of the Senate. All his subordinates are selected under civil service regulations.

THE SUPERINTENDENT OF DOCUMENTS.

The office of the superintendent of documents supervises the distribution of all publications of the federal government. Such publications, for the most part, are sold, not given away. The superintendent is appointed by the public printer and is under his general direction, but the office is independent in the sense that it receives its own direct appropriation from Congress. Any government publication can be obtained from the superintendent of documents at the listed price. Free copies are supplied to a selected list of libraries throughout the country.

THE SMITHSONIAN INSTITUTION.

One of the little known but interesting agencies in this list is the Smithsonian Institution. More than a hundred years ago, an Englishman named James Smithson bequeathed a half-million dollars to the United States of America to found "an establishment for the increase and diffusion of knowledge among men." Why he did this nobody knows, for Smithson had never been in America. He was born in France, educated in England, and died in Italy. At any rate Congress accepted the bequest, created the Smithsonian Institution, and in 1904 did honor to the benefactor by bringing his bones from Genoa to rest in American soil. The institution is governed by a board of regents consisting of the Vice-President of the United States, the Chief

Justice, three senators, three members of the House, and six citizens appointed by joint resolution of Congress. It has under its operating direction various scientific, literary, and artistic activities including the bureau of American ethnology, the national zoological park, the United States national museum, and the national gallery of art.

VETERANS' ADMINISTRATION.

Then there is the veterans' administration into which have been consolidated all federal agencies dealing with veterans' affairs. In 1930 it took over the old bureau of pensions which for many years was included in the department of the interior. In brief, the veterans' administration administers all laws relating to pensions, relief, insurance, hospitalization, and other benefits provided for former members of the military and naval forces or for their widows or dependents. The head of the veterans' administration is an administrator appointed by the President. Some idea of the extensive work which this administration performs may be gleaned from the fact that it has 43,500 employees.

OTHER AGENCIES.

A score or more of other bodies, varying in importance, have names which generally indicate their functions. Among them are the railroad retirement board, the inland waterways commission, the general accounting office, the battle monuments commission, the national archives council, the national historical publications commission, various international boundary commissions, the board of surveys and maps, the central statistical board, the national research council, the science advisory board, and many others.

III. THE EMERGENCY SERVICES

GOVERNMENTAL ACTIVITY IN AN ECONOMIC DEPRESSION.

The economic depression which began in 1929 was not the first of its kind. It differed from previous depressions, however, in its wider scope and greater severity. Likewise, there was a difference in the procedure by which the country tried to deal with it. In all previous economic emergencies (such as those of 1837, 1873, and 1893), the federal government left the problem of relieving unemployment to the states and municipalities. In the early stages of the latest depression, it tried to do the same thing; but the critical nature of the situation dictated a change in policy, and eventually the federal authorities found themselves loaded with most of the burden. It became their task to provide a program of relief and recovery legislation, with which it seemed desirable to combine a considerable amount of economic and social reform. This, in turn, necessitated the creation of many new commissions, boards, bureaus, offices, and other administrative authorities — the alphabetical agencies, as they

have commonly been called. Ostensibly established on a temporary basis, many of these have now achieved a permanent place in the system of national administration. On the other hand, many others have already been abolished.

Earliest among these emergency services was the reconstruction finance corporation (R F C). It was set up by Congress in 1932 and given functions which have been greatly widened by subsequent legislation. The chief function of the reconstruction finance corporation is to provide emergency financing facilities for various institutions and enterprises, including banks, trust companies, building and loan associations, mortgage companies, credit unions, insurance companies, and railroads, as well as for a wide variety of industrial and commercial concerns. This is done by lending money, either directly or through some other government agency. Such loans are made upon security in the form of bonds, debentures, notes, or preferred stock, which are issued to the government by the borrower. In addition, the corporation has been authorized and directed by law or by executive order to provide funds for various emergency services such as the farm credit administration, the federal housing administration and, more recently, for purposes connected with the national defense program. To provide this money the R F C is authorized to issue and sell its own bonds, debentures, notes and other obligations (guaranteed by the government) to the extent of many billions of dollars.

THE RECONSTRUCTION FINANCE CORPORATION.

ITS FUNCTIONS.

AGRICULTURAL AND INDUSTRIAL RECOVERY AGENCIES

The economic depression of the early thirties bore heavily on the farming sections. To give speedy relief, an agricultural adjustment administration (A A A) was established in 1933. Although within the jurisdiction of the secretary of agriculture, it was placed under the immediate direction of an administrator appointed by the President. The avowed purpose of the A A A was to raise the purchasing power of American agricultural producers and thereby promote economic recovery. This it endeavored to do by production-adjustment programs and other activities which were designed, for the benefit of agriculturists, to get rid of price-depressing surpluses and to maintain a balance between production and effective demand. This production-control program was financed by the levy of what are known as "processing taxes." But many of the concerns which were subject to these processing taxes refused to pay and carried the matter into

THE AGRICULTURAL ADJUSTMENT ADMINISTRATION.

DECLARED UNCONSTITUTIONAL IN 1936.

court, where the processing-tax feature of the Agricultural Adjustment Act was declared unconstitutional.

The invalidation of the original Agricultural Adjustment Act by this decision left the problem of assistance to the farmer unsolved, and Congress immediately sought to achieve the desired ends by means which would not go beyond the limits of the Constitution. It found a solution (1936) by providing payments to agriculturists for "soil conservation" and linking production control to this program. A little later a new Agricultural Adjustment Act (1938) was passed, and this measure widened the effectiveness of crop control in ways which will be explained later.[1]

THE NEW AGRICULTURAL ARRANGEMENT.

Meanwhile, the first comprehensive attempt to speed industrial recovery was embodied in the National Industrial Recovery Act of 1933. The broad purpose of this measure was to increase employment and to raise wages, which would augment the purchasing power of the country. It also sought to procure the elimination of unfair competition by placing all members of the same industry on an equal basis as regards maximum hours of labor and minimum wages. To achieve these ends, it was provided that each industry should agree upon a code of fair competition applicable to itself and submit this code to the national recovery administration for approval. It was provided that each code, upon approval, would have the effect of a federal statute, the enforcement of the code provisions being vested in the first instance in a code authority, chosen within the industry itself, but ultimately in the national recovery administration. But here again the Supreme Court (this time by unanimous decision) intervened to declare the National Industrial Recovery Act unconstitutional — primarily on the ground that it delegated to industries, under the supervision of a national administration, the right to make the laws of the land.

NATIONAL RECOVERY ADMINISTRATION.

The invalidation of the National Industrial Recovery Act was a disappointment to organized labor because the act had provided that codes, to be approved, must contain provision for collective bargaining between workers and employers. Congress therefore enacted in 1935 a separate measure covering this matter, the National Labor Relations Act known commonly as the Wagner Act. This statute guarantees to employees the right of collective bargaining, and protects them from certain enumerated unfair practices. Its administration lies with a national labor relations board, the three members of which are appointed by the President and Senate

NATIONAL LABOR RELATIONS BOARD.

[1] See p. 465.

for a term of five years. For the purpose of collective bargaining the board may hold a secret ballot to determine which, among rival organizations, shall represent the workers; and for the purpose of ending unfair practices it investigates complaints and, having sustained them, issues cease and desist orders, which may be challenged before a circuit court of appeals.

The unfair practices are peculiar because of their unilateral character — their application solely to misconduct on the part of employers. They relate to such matters as interference with self-organization and collective bargaining by the worker and discrimination against a worker who has been active in his union or who has filed complaints or who has given testimony in support of complaints. Employers feel that the dice have been loaded against them in this matter; and their sense of grievance has been deepened by certain rulings of the national labor relations board which seem to go beyond what the laws intended.[1]

ITS CONSTITUTIONAL BASIS SUSTAINED BY THE COURT.

The act which set up this board had a second peculiarity. It was passed by virtue of the national government's power to regulate interstate commerce, but what it actually sought to regulate was industry — that is, labor in industry. Indirectly, however, a connection with interstate commerce was found in its avowed object of removing obstructions to the free flow of interstate commerce, such as interference with the right of the workers to organize and bargain collectively. Constitutional lawyers quite generally believed that the Supreme Court, adhering to a settled doctrine of the preceding forty years, would hold the Wagner Act unconstitutional. But by a bare majority the Court reversed itself and in 1937 sustained the act as a regulation of interstate commerce. Did not the manufacturer obtain raw materials from various states and, after processing them, ship finished products all over the country? True, the workers were engaged in local industry, but "the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce." It would create an obstruction. Thus the Wagner Act and the board created by it were upheld.

FEDERAL EMERGENCY RELIEF ADMINISTRATION.

When it became apparent, in 1933, that the states and municipalities could not carry the burden of relief due to unemployment, Congress authorized a large appropriation to aid the states in meeting their relief costs. In due course a nation-wide public works program was also developed under the public works administration, and the national government decided that

[1] This board must not be confused with the national war labor board, which was set up and attached to the office for emergency management by executive order early in 1942. The function of the N W L B was to adjust and settle labor disputes which might interrupt work contributing to the effective prosecution of the nation's war effort.

all employable persons on direct relief were to be transferred to work projects, leaving the unemployables to be supported by the states and municipalities.

To administer this program, for which Congress provided appropriations running up into the billions, the public works administration (P W A) was set up, which was succeeded by a works progress administration (W P A). These bodies gave employment to millions during the depression years by undertaking or subsidizing all manner of public improvements, such as roads, public buildings, parks, and so on. The usual arrangement has been for the states or municipalities to plan the project and supply the materials while the national government has paid for the labor. With the growth of demand for labor in connection with the national defense program and the consequent rise in employment, the public works enterprises have diminished greatly in number and in scope. Both P W A and W P A were liquidated in 1943.

The federal public works program has been supplemented since 1937 by housing enterprises under the provisions of the United States Housing Act which Congress passed in that year to promote slum clearance and low-cost housing. The United States housing authority, under the provisions of this act, does not make loans to individuals but assists any properly constituted public bodies such as state housing authorities or municipalities to undertake low-cost, low-rental, large-scale housing projects. Groups of sponsoring private citizens, organized on a nonprofit basis, may also be aided in this way. When housing projects are constructed by the federal authorities, they may be leased to and managed by local groups on approved terms. This work should not be confused with that of the federal housing administration, which was established under the provisions of the National Housing Act in 1934. Its function is to insure banks and other lending institutions against losses on loans made by them for house construction and home renovation. No loans to individual borrowers are made by the F H A. It merely guarantees to reimburse banks and other credit institutions for a certain percentage of the losses which they may incur through making loans to private individuals within the limitations prescribed. To obtain the benefit of this insurance, all loans must have the approval of the F H A at the time that they are made.

Two federal agencies that were liquidated in 1943 deserve passing mention. The civilian conservation corps won widespread approval. It was designed to provide work and vocational training for unmarried, unemployed young men, between the ages of seventeen and twenty-three, and to a limited extent, for war veterans and Indians. Original

enrollment for six months might be extended to a maximum of two years, the period of service actually averaging about ten months. Three hundred thousand young men, distributed among 1,500 camps in the several states and outlying possessions, devoted themselves to the conservation of our natural resources: they built roads, planted trees, fought forest fires, made firebreaks, combated soil erosion. Meanwhile, either in connection with their work or in classrooms after work hours, they were prepared for some useful employment (such as bridgebuilding or forestry). The national youth administration had a double purpose. In the first place, it paid small monthly wages to hundreds of thousands of students, who otherwise might have had to leave high school or college, for work assigned by the educational authorities. In the second place, it prepared out-of-school youths for private employment. In thousands of workshops it gave an opportunity to gain practical experience with electricity, automotive mechanics, riveting, welding, lathing, etc. In this case also, N Y A paid a small monthly wage.

CIVILIAN CONSERVATION CORPS AND NATIONAL YOUTH ADMINISTRATION.

The number of civilian emergency services has shrunk somewhat during the recent years. In the process of reorganization, some have been abolished; some, merged with others under a new name; some, transferred to this or that department. The abolition of W P A, P W A, N Y A, and C C C has been noticed. It is unnecessary to catalogue here either the numerous defunct agencies or the forty-odd agencies that still retain their independence. The situation changes rapidly — one might say, from month to month; and curiosity can best be satisfied by consulting the *United States Government Manual*, which gives fairly complete data and keeps abreast of new developments.[1] In the appendix of recent editions appears the succinct history of some 300 "abolished and transferred agencies."

THE EXISTING SITUATION.

Even before America's actual entry into the Second World War, the regular civilian establishments were augmented by a whole flock of special defense and wartime agencies, and their number grew by leaps and bounds after Pearl Harbor. Some of the better known were the war production board, the office of price administration, the national war labor board, the foreign economic administration, the office of war mobilization, etc. These agencies were regarded as vital to the successful prosecution of the war. They employed huge staffs and exercised an unprecedented degree of control over the

NATIONAL DEFENSE AGENCIES.

[1] Sold by the superintendent of documents, Washington, D. C., at $1.00. A more comprehensive volume is the *Congressional Directory* (two editions annually; price, $1.25). While it contains more varied material, smaller type and larger pages enable it to describe the administrative services as fully as does the *Manual*.

nation's economy and over the daily concerns of the people. The activities of some of them are touched upon elsewhere in this text.[1] Several of the more important of these wartime agencies were abolished almost as soon as peace returned, for example, the war labor board, the war production board, and the foreign economic administration. Others were continued temporarily to aid in the task of reconversion; but their ultimate disappearance appears fairly certain.

CONCLUSION.

The administrative services of the United States now constitute a huge and highly complicated mechanism, which has spread itself from the national capital into every nook and corner of the land. Every department, bureau, board, and commission has its functionaries scattered all over the country. Despite assurances to the contrary, many of these officials have been given their places as a reward for party service. Consequently, they do not always represent a high standard of administrative efficiency. It is a commonplace that laws are no better than the men who administer them, but no commonplace of statesmanship has been more flagrantly disregarded than this one. The most immediate need of the American governmental system today is not a conveyance of greater powers to the national government, or more laws, or more executive orders, or a further elaboration of the administrative machinery. More urgent than any of these is the need for a more competent and better-trained administrative personnel in all ranks of the government service.

This improvement can only be secured by making the public service a career of such attractiveness and security of tenure that it will draw young men of ability into it and keep them there. It is futile to talk of effective, long-range economic or social planning so long as we maintain in full vigor a spoils system which is the very negation of all that planning implies. It is idle to expect that the economic life of the nation can be guided into proper channels by men whose chief claim to a place in the public service is the fact that they have failed to make headway in private vocations. No new deal in this or any other country will prove an enduring success until the thousands of subordinate public officials to whom the routine work of administration is entrusted are chosen on a merit basis, accorded a reasonable degree of security, and properly trained in the work which they are expected to do.

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[1] See pp. 446, 451, and 496.

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CHAPTER XVI

THE CIVIL SERVICE AND ADMINISTRATIVE PERSONNEL

The government of Great Britain is in fact carried on, not by the cabinet, nor even the individual ministers, but by the civil service. — *Sidney and Beatrice Webb.*

VITAL ROLE OF THE CIVIL SERVICE.

Constitute government as you will, its efficiency in action will largely depend upon the competence and integrity of the thousands of men and women who serve in its subordinate ranks. Among students of political science there has been much discussion concerning forms of government — whether this or that form is the better. Questions relating to the size of Congress, the method of nominating candidates for Congress, the simplification of legislative procedure, the powers of the Supreme Court, not to speak of single-chamber legislatures for the states and proportional representation in city councils — such questions have been hotly debated as though the effectiveness of a government depended in large measure upon its organization at the top. It depends, in the long run and in larger measure, on its organization at the bottom. For each individual man or woman in Congress helping to make the laws and to vote the money, there are several thousand other men and women whose function it is to administer these laws and spend the money.

MUCH DEPENDENT ON METHOD OF SELECTION.

It would seem to follow from this fact that the utmost care should be exercised in recruiting, appointing, and supervising the million or more subordinate members of the federal administrative service. Every effort should be made to insure that selections are made on a merit basis, as provided by civil service regulations, and that promotions follow the same rule, regardless of purely political considerations. Probably nine tenths of the American people would agree with that general proposition. The other tenth comprise the practical politicians, who want to get jobs for their friends, whether meritorious or otherwise, together with the considerable number of people who are interested in, and who profit by, the lax administration of the laws. There is no reason, for example, why subversive

elements of any sort should be anxious to have the employees of the federal bureau of investigation appointed or promoted on a strictly merit basis.

WHY OLD ABUSES PERSIST.

Now, if there is a fairly general agreement among honest citizens that public employment should be based on merit rather than upon political favoritism, why is it that more than one third of all federal employees still remain outside the merit system? Why do we leave so many positions, high and low, to be filled by the seekers of patronage? Despite all the progress of the past sixty years there are more federal positions exempt from the civil service laws today than there were when the first civil service law was passed in 1883.

There are three answers to that question. The first is that most laymen, unfamiliar with governmental activities in detail, do not appreciate how great is the need for skill and intelligence in most of these public positions. They think of administrative work as routine which almost anyone can perform. The second answer carries back into history: the spoils system got a foothold more than a hundred years ago, and a tradition of that age is hard to eradicate not only from the laws, but from the psychology of the public. The third answer is that howsoever excellent the merit system may seem to be as a plan on paper, its functioning in practice usually leaves much to be desired. Selection and promotion by merit, and by merit only, is the end in view; but by whom and by what means shall relative merit be determined, on what kind of ratings shall promotions be based, what shall be done with the employee who gains his place by merit but lapses into inefficiency thereafter — these and a dozen other problems of a practical nature have to be faced and solved before a civil service system can be made to operate satisfactorily.

YET EXPERTS ARE NEEDED.

Some things which have been mentioned in the foregoing paragraph deserve a further word or two. The popular idea that public employment is largely a matter of routine duties, requiring no more skill or intelligence than the average citizen can muster, is not an unnatural one. Most of the government employees with whom the average citizen comes into contact, the post office clerks for example, seem to be doing that kind of work. Rarely does the citizen come into immediate contact with the thousands of accountants, statisticians, economists, architects, engineers, chemists, biologists, entomologists, meteorologists, geologists, foresters, bank examiners, and so on, whose work is far from simple. With the increasing complexity of governmental activities, especially in connection with the regulation of business, the need for technical expertness in the public service has become steadily greater, and it cannot be secured otherwise than by setting up strict qualifications for appointment.

But the merit system has had to make its way against a firmly entrenched American tradition — the idea that places on the public pay roll are spoils of victory, to be distributed to the workers in a successful political campaign. In the early days of the Republic there was no spoils system because there were no spoils, at any rate not enough to be worth fighting for.[1] When the capital was moved to Washington in 1800, a dozen years after the Constitution had gone into force, there were only a few hundred employees. Two departments, state and post office, had in each case a staff of nine; the navy, 15; war, 18. The treasury staff of 69 was larger than the others put together.[2] But the number began to increase, and it kept increasing until, a quarter of a century later, it was up in the thousands.[3] There developed a feeling, moreover, that too many of these positions were being given to appointees from the seaboard states, the new West being overlooked. So, in 1828, when Andrew Jackson emerged from Tennessee and "swept over the land like a tropical tornado," as Henry Clay expressed it, he proceeded to dismiss large numbers of federal officeholders. The positions thus vacated were promptly filled with supporters of the new frontier democracy. By this action the spoils system was given a foothold, and the public imagination has attributed its fatherhood to Andrew Jackson. That is not altogether fair, because the spoils system was already rampant in some of the states, especially New York and Pennsylvania, and in most of the large cities. Jackson's administration merely adopted it, fully and frankly, as a national policy.

GENESIS OF THE SPOILS SYSTEM.

This was in the days immediately following Jackson's first inauguration (1829), and for the next fifty years the spoils system had a recognized place among the practicalities of American politics. It smeared all branches of administration — national, state, and local. Virtually all positions in the government service were treated as booty, to be parceled out among the stal-

ITS GROWTH IN THE NINETEENTH CENTURY.

[1] The fact that danger lurked in the appointing power, however, did not escape the eyes of the Fathers. Impeachment, Madison said, would provide an antidote to serious abuses. Washington pledged himself to nominate only "the best qualified"; and he adhered to that policy except that, with the rise of organized parties, he (and still more his successor) tended to find the best qualifications among Federalists. Jefferson made room for some of his supporters by removing Federalist incumbents, but he did not do this in any systematic way.

[2] Today more than 2,000 clerks are engaged in signing checks to meet the obligations of the United States. How small the business of the post office department was in those early days may be gathered from the fact that, when President Washington appointed the first postmaster general, there were only 75 post offices in the country and that, as late as 1812, the post office at New York had only four clerks. In 1943 the post office department employed more than 330,000 persons.

[3] It reached 50,000 at the time of the Civil War; 100,000 about twenty years later, 500,000 after we entered the First World War, a million in 1940, two million in 1942, and three million in 1944.

warts after each election. When a new administration came in, virtually all who had government jobs went out, making room for a fresh swarm of pay roll patriots. Post offices in towns and villages throughout the land became ambulatory; in each quadrennium they moved from one end of Main Street to the other, following the politics and preferences of the postmaster. Nowhere in the government service during these years did personal competence count for much. Applicants for public employment were not asked to state what they could do but what they had done — for the party. Candidates for Congress found it necessary to make all sorts of promises during the election campaign, and then had to fulfill these promises, if they could, by wheedling patronage out of the higher-ups in Washington.

ITS EVIL EFFECT UPON THE PUBLIC SERVICE.

Under such conditions the whole public service became demoralized. The President and members of his cabinet had to spend a large part of their time listening to the importunities of senators and representatives, who came in endless succession urging appointments for their constituents. Then, in turn, these congressmen had to disburse much of their energy in an effort to pacify those supporters in their home districts who wanted to batten themselves on the public treasury. Patronage, which included not only government jobs, but contracts, purchases, and favors of all kinds, developed into political mendicancy on a nationwide scale and dulled the self-respect of everyone connected with it.

ARGUMENTS IN ITS FAVOR: (1) SUSTENANCE IN PARTIES.

Yet this spoils system, notwithstanding its obvious evils, was supported by various plausible arguments. Some of its friends pointed out that, since political parties were essential in a democratic scheme of government, it was the duty of such governments to support and strengthen political parties. This could only be done by giving them recognition in the form of patronage. Without this means of sustenance, parties would weaken and ultimately fade out of the picture.

PLUNKITT'S PHILOSOPHY OF SUSTENANCE.

More than a generation ago a Tammany district leader, George Washington Plunkitt, summarized the case against civil service reform in imperishable rhetoric: "First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get the offices when they win; third, if the parties go to pieces, the government they built up must go to pieces too; fourth, then there'll be h— to pay. Could anything be clearer than that? Say, honest now, can you answer that argument? . . . Let me tell you that patriotism has been dying out fast for the last twenty years. Before then when a party won,

its workers got everything in sight. That was somethin' to make a man patriotic. Now, when a party wins and its men come forward and ask for their reward, the reply is, 'Nothin' doin', unless you can answer a list of questions about Egyptian mummies and how many years it will take for a bird to wear out a mass of iron as big as the earth by steppin' on it once in a century.' " [1]

Another argument was based upon the principle of responsible government. When the people elected a new administration, it was said, they voted for a change all the way down the line, not merely for a change at the top. If the higher officials in government are to be held responsible for carrying out the mandate of the people, they cannot fairly be asked to do this through subordinates whom they have not appointed and in whom they may have no confidence. The spoils system, again, was lauded as a truly American way of doing things; it gave everyone a chance to serve his country in peace as well as in war. "Ah, how many young men," to quote Plunkitt again, "have had their patriotism blasted" by running up against a civil service examination!

(2) MAKES GOVERNMENT TRULY RESPONSIBLE.

(3) CHARACTERISTICALLY AMERICAN.

A final argument for the spoils system was that it could be counted upon to prevent men from acquiring a life tenure in public office and behaving accordingly. In his first annual message to Congress, President Jackson wrote: "Office is considered as a species of property, and government rather as a means of promoting individual interests than as an instrument created solely for the service of the people. Corruption in some and in others a perversion of correct feelings and principles divert government from its legitimate ends and make it an engine for the support of the few at the expense of the many. The duties of public office are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance, and I cannot but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience." He therefore urged that appointments should generally be limited to four years. "Offices were not established to give support to particular men at public expense. No individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is a matter of right." Rotation, he added, constitutes a leading principle in the republican creed.[2]

These various arguments, although they sound rather hollow nowadays, carried weight with large bodies of voters two generations ago.

[1] William L. Riordon, *Plunkitt of Tammany Hall* (New York, 1905).
[2] Richardson, *Messages and Papers of the Presidents*, Vol. III, pp. 1011–1012.

As a practical matter, the vicious circle of politics, power, and patronage is always hard to break. Patronage assists men to success in politics; this success places them in power, where they can assure the continuance of patronage. Reformers tried for a long time to break the circle, but without much success until 1881, when a tragic happening shocked the country and roused its people to the need for action. This was the assassination of President Garfield by an office seeker whose demands had been refused. Things had come to such a pass that a President could not refuse patronage except at the risk of his life. A wave of resentment swept over the country. In 1883 Congress passed the nation's first comprehensive civil service law, commonly known as the Pendleton Act.[1]

COMPREHENSIVE CIVIL SERVICE REFORM, 1883.

As subsequently amended, and greatly widened, this law provides for a federal civil service commission of three members appointed by the President and confirmed by the Senate. Not more than two of them may be from the same political party. The commission is charged with the duty of examining all candidates for positions in what is known as the "classified service." At the outset this category included hardly ten per cent of the federal government's employees, chiefly clerks in Washington, but it has now been greatly expanded. This expansion has not been regular and steady, but spasmodic. Sometimes a marked advance by the merit system has been followed in the next presidential administration by a retreat of almost equal proportions; but the gains, on the whole, have exceeded the losses in almost every decade.

SUBSEQUENT GROWTH OF THE "CLASSIFIED SERVICE."

Setbacks for the merit system and a resurgence of the spoils system are always likely to occur when, after an interlude of wandering in the wilderness, one of the major political parties reaches the promised land of executive power. It is true, of course, that even then a resolute President may manage to fend off the commando raids on the public pay roll. President Wilson, being committed to uphold the merit system, did in fact restrain the more avaricious among his supporters. But President Harding, when he came into office, had no such scruples. During the first four years of the New Deal (1933–1937) when many new agencies were set up as a means of combating the depression, the percentage of classified employees (that is, employees within the civil service classifica-

[1] Earlier legislation — in 1853, 1855, and 1871 — had been tentative, limited in scope, and ineffective. It was British practice that focused American attention upon the merit system. Shortly before Guiteau shot President Garfield, a highly influential book had appeared, Dorman B. Eaton's *The Civil Service in Great Britain*. Fortunately — and somewhat surprisingly, when his political background in New York is considered — President Arthur gave civil service reform strong support.

tions) fell from 82 to 64. The second four years, however, were marked by a reverse swing, which brought the percentage back to 73.

Then the war intervened. Within less than three years the number of civilians in the employ of the national government was more than doubled; and the proportion of classified employees declined sharply. The extent of the decline cannot be ascertained because of wartime changes in procedures and activities. Under normal conditions, it seems altogether probable that the merit system will resume its progress and eventually include all civilians in the employ of the federal government, except those whose work is of a policy-determining character, such as the heads of departments or bureaus, members of administrative boards, etc., whose numbers would probably not exceed a few thousand in all.

THE MECHANICS OF THE CIVIL SERVICE SYSTEM

How are appointments in the classified service now made? With the exception of a relatively few positions of a special or emergency nature which are filled by recommendation of the civil service commission on a noncompetitive basis, all are filled by some form of open competition. These competitions are announced by the commission and are conducted in various parts of the country by examining boards appointed for the purpose. For clerical and other routine positions the applicants are examined in groups, but for posts which require technical proficiency (e.g., in the bureau of soil chemistry) the practice is to rate the candidates individually on a basis of their training and experience rather than to give them a written examination in groups. Tests of this kind are commonly known as "unassembled" examinations.

COMPETITIVE EXAMINATIONS.

One should not make the error of thinking that civil service examinations of either of the foregoing types are academic in character or bear much resemblance to those given in colleges. The laws require that they be "practical" in character and related to the work which the appointee would be expected to do. This requirement, however, has certain disadvantages, which will be considered shortly. At any rate, it demands that the examinations be of great variety, there being different ones for each kind of position to be filled; in fact the commission has set as many as seventeen hundred separate types of examinations. The questions are prepared by experts, either from the regular staff of the civil service commission, or selected from the department in which the successful candidates will be placed, or chosen from the outside. The results of the examinations are graded on a

THEIR PRACTICAL NATURE.

percentage basis; and the names of those who have passed satisfactorily are then placed on an eligible list, called "the register." There is an eligible register for each type of work.

So, when an accountant, stenographer, or some other classified employee is needed in any department, the civil service commission transmits the names of the three persons who stand highest on the appropriate list of eligibles. The appointing authority takes his choice from among these three.[1] The other two keep their places on the list. As the names at the top are taken off by successive appointments, the names farther down get their chance. The process goes on until the eligible list is nearly exhausted, whereupon a new examination is held. According to a new rule (1939), the life of an eligible register ends in one year unless the commission formally extends it for a second year. Under previous practice a register was sometimes maintained for five or six years. Those who receive appointments by civil service procedure are deemed to be serving on probation for six months (in some cases for a year); and permanent tenure does not begin until the end of this probationary interval.

PREFERENCE GIVEN TO VETERANS.

In conformity with a statute of 1919, the rules of the merit system have been relaxed for the benefit of veterans; and against this relaxation there has been much complaint. The term "veteran," as used in this connection, is not restricted to men who have had active service in wartime. It includes, for example, all honorably discharged, or retired, members of the armed forces, reservists, graduates of Annapolis and West Point, coast guard cadets, etc.; their widows; and the wives of disabled veterans. Ten per cent is added to the earned ratings in the case of all disabled veterans (or their wives when the disability prevents the husband from working), and their widows. All other "veterans" get a five per cent bonus. And all are placed on the eligible register if, with their preference added to the earned rating, they attain the passing grade of seventy; and disabled veterans are then ranked above all other eligibles. In addition, the age limit is waived except for certain "junior" and "apprentice" posts; and, in the case of disabled veterans, so are physical requirements, unless such a relaxation of the rules would seriously impair the veteran's efficiency or tend to endanger fellow employees or unduly jeopardize the retirement and compensation funds.[2]

[1] If he rejects all three, he must give adequate reasons. Under the British system only one name is presented.

[2] During the first twenty years of this preference (1920–1939) almost a quarter of all appointments under the merit system went to veterans, or, to be exact, 234,853 or 24.3 per cent. See the table on p. 405 of James C. O'Brien and Philip P. Maremberg, *Your Federal Civil Service* (New York, 1940).

When the system of veterans' preferences was first established, there was no idea that it would work such havoc with the principle of open competition. What has actually resulted is the setting up of a privileged class, not merely of war veterans, disabled or otherwise, but of peacetime soldiers and their widows as well. Civilian applicants with ratings of 75 or 80 are often edged out of the way by men and women who could not have qualified at all without their five or ten per cent preference. When the civil service commission, a few years ago, set up a new category designed to attract recent college graduates, the first fifty places on the eligible register were taken by veterans (for whom the age limit had been waived), although 40 per cent of them made the passing grade only with the help of their ten per cent preference. Few people will disagree with the proposition that men who have served in the armed services during a war are entitled to some special consideration at the hands of their country, but surely there are better methods of according it than by encumbering the public service in this way.

ITS RESULTS.

Those appointed under the merit system are given, at the end of their probationary term, what is known as permanent tenure. They may be disciplined for chronic lateness, neglect of duty, or infraction of the rules by measures of varying severity, which include reprimand, reduction in rank, and suspension without pay for a maximum period of seventy days. But they hold their posts as long as they give satisfactory service. Dismissals for religious or political reasons are specifically forbidden. When the head of a department wishes to dismiss any employee who is in the classified service, he must state his reasons in writing and permit the employee to make a written reply so that the whole matter shall be on record. But the employee is not entitled to a formal hearing nor does he have any right of appeal to the courts. In this respect the national practice differs from that followed in those states and cities which have adopted the merit system. There formal hearings are usually required, and an appeal to the courts is sometimes permitted. This arrangement has often been criticized as tending to impair discipline in that it becomes very difficult to dismiss any classified state or municipal employee, however incompetent, if he chooses to fight the issue with aggressive lawyers on his side.

PERMANENCE OF TENURE — DISCIPLINE AND REMOVAL.

Officials and employees of the federal government (except those in policy-determining positions) are forbidden to take any active part, directly or indirectly, in political management or political campaigns. They must not serve as delegates to party conventions or use their official positions to further the party interests in any way. The Hatch Act of

1939 included these sweeping provisions and various other restrictions upon the political activity of federal officers, whether in the classified service or outside it. This, of course, does not prevent them from voting at elections or attending political meetings, provided they do not serve as organizers or speakers. The act was later amended (1940) to include employees of a state or its subdivisions when engaged in an activity being financed in whole or in part by the United States or one of its agencies. Other federal laws prohibit congressmen and other federal officers from soliciting civil servants for political contributions and any other person from doing so in a federal building. These prohibitions have not been entirely effective, and some political activity on the part of federal officeholders still goes on in an unobtrusive way; but the Hatch Act represents a long stride in the direction of keeping the national administrative service aloof from partisan politics.

POLITICAL ACTIVITY AND POLITICAL CONTRIBUTIONS FORBIDDEN.

The merit system, to be true to its name, must make provision for promotions as well as for initial appointments. Otherwise every employee will feel under obligation to accumulate enough political influence to effect his advancement when the time comes. Theoretically all promotions should be made on a strictly merit basis, without any regard to political pressure; but the problem of carrying this sound theory into practice is an extremely difficult one. As yet it has nowhere been completely solved. One method is to use competitive promotional examinations. Then arises the question of whether the competitors should be restricted to persons already in the service or open to outsiders as well. Should they be, in fact, restricted to persons already serving the department or bureau in which the promotion is being made? On the one hand, it is contended that young men and women will be discouraged from entering the public service in the lower ranks, if outsiders are allowed to come and step into the higher positions. On the other hand, it is argued that, if an outsider can rank higher in a promotional examination than those who have had the advantage of several years' inside experience, he ought to have the place under anything that ventures to call itself a merit system.

PROMOTIONS:

1. BY EXAMINATIONS.

In any event, the competitive examination, whether closed or open, is rather generally regarded as an inadequate means of determining fitness for promotion.[1] Such qualities as diligence, loyalty to superiors, punctuality, tact, and real interest in

2. BY EFFICIENCY RATINGS.

[1] Reliance upon examinations as a basis of promotion has been quite generally condemned in Great Britain. Experience seems to show that such written tests are inadequate in the case of older persons, and that younger men are diverted from official duties by the work of preparation.

one's work can hardly be determined by any type of formal examination. They disclose themselves in the actual performance of the job. Accordingly, it has become the practice to keep an efficiency record or rating sheet for each employee and to use these, in part at least, as the basis for determining promotions. Among the available candidates within a department or bureau the ones with the best efficiency records are submitted to the administrative chief, and he makes the selection from these, with or without a formal examination, as he deems best. The rating sheets contain the detailed record of each employee, as indicated by his immediate superiors, during the time he has been in the service. When impartially compiled, these efficiency records are of the greatest value, but complaint is often made that opportunities for favoritism still remain in the hands of those who determine the ratings. In any event, most promotions in the classified service of the national government are actually left to the discretion of the department head or bureau chief, which means that they are in some degree open to political influence; but, in the main, the selections are made from among those who have rendered good service in the lower ranks.

PAY AND PENSIONS.

Every position in the federal service carries a stated rate of pay.[1] In many instances this rate was fixed by Congress at the time the posts were created, but during recent years some progress has been made in the way of classifying and standardizing the pay of positions which involve the same kind of work (all junior accountants, for example) irrespective of the department to which they may be attached. This has helped to reduce the considerable variations in salary scales which formerly existed; but even yet many government employees receive different rates of pay for performing exactly the same duties. In most cases there are stated increases for length of service, with a definite maximum. For some years the civil service commission has been working on the huge task of preparing a comprehensive classification of posts according to duties, covering the entire service, so that some approach to a complete standardization of salaries may be achieved.

ORGANIZATION OF CIVIL SERVANTS.

Congress, in the last analysis, determines the remuneration which public employees shall receive, and it is naturally susceptible to the political pressure which these hundreds of thousands of government workers (with their relatives and friends) can bring to bear. In private employment the workers bring pressure through their unions, and in public employment the workers have learned to do likewise. For many years the tendency was to discourage the unionization of federal employees; but towards the

[1] See the list in the *Annual Report* of the United States Civil Service Commission.

end of the last century, letter carriers, postal clerks, and railway mail clerks organized and soon began to make demands, which their numbers rendered formidable, for increase of pay and decrease of hours. President Theodore Roosevelt forbade the exercise of such pressure upon Congress, the penalty for disobedience being dismissal. Considerable resentment followed in the wake of this action. Eventually Congress was persuaded to pass an act (1912) which conceded the right of federal employees to organize, petition for increased pay or for improved working conditions, and even affiliate with national labor organizations, providing such affiliation did not carry with it any obligation to strike.

This permission to organize for the promotion of their own interests has been extensively utilized by employees in various branches of public administration, especially by those in the postal service.[1] Their capacity to exert political pressure has been correspondingly expanded, and their lobbying activities in Washington have become conspicuous. With the steady increase in the number of public employees, this concentrated pressure may become a serious danger, especially if organizations of public employees develop the habit of going on strike for whatever they want and cannot obtain by other methods. For while it is true that no assertion of the right to strike has as yet been put forward by any of them, there can be no certainty that such an attitude will not be taken if the organizations grow strong enough and find themselves in a position to insist upon it.

RETIREMENT ANNUITIES.

Workers in private employment have a general impression that men and women who hold government jobs are pretty well treated; and, on the whole, this impression is not without some basis. Employees in the classified service have short hours of work, security of tenure, lenient discipline, the right to organize, and rates of pay which, under normal conditions, do not compare unfavorably with what is paid for similar work elsewhere. In addition there is a civil service retirement fund, to which both the employees and the government contribute, and from this fund retiring annuities are paid to those who reach the age limit. The system of retirement annuities was established by Congress in 1920 rather hesitantly and under pressure from organized groups of federal employees. Something of the sort was badly needed because old employees, who had saved little or nothing out of their salaries, could not afford to retire and clung to their places like

[1] Outside the postal service, the chief organized groups are the national federation of federal employees (founded in 1917), which was affiliated with the A. F. of L. till 1931; the American federation of government employees (1932), which resulted from a schism in the national federation and which inclines towards the CIO; and the united federal workers of America (1937), which is affiliated with the CIO.

barnacles to the hull of a tramp steamer. To a degree, therefore, the public pay roll became a pension list. Now the employee contributes five per cent of his salary to an individual retirement fund which the government credits with interest at four per cent compounded annually, and to which it also adds enough to increase the annuity by $900 per year.[1] In 1942, Congress set up an alternative system which allows an employee a retiring annuity, amounting to one seventieth of his average salary during any period of five years multiplied by his years of service not to exceed thirty-five. This has made it possible for employees in the high salary brackets to retire on a pension of several thousand dollars.

EFFECT OF FLUCTUATIONS IN THE COST OF LIVING.

The salaries of public employees, usually fixed by law, are difficult to change when the cost of living goes up. With a rising level of prices, therefore, the real remuneration of government workers undergoes a decrease and may be, for a time, below the prevailing rates in private enterprises. This is particularly true of the printers, carpenters, draftsmen, and other mechanical tradesmen, whom the national government employs in large numbers. But such discrepancies do not remain very long. Congress can usually be persuaded to adjust wages upward when the cost of living soars. It is not so ready to adjust them downward (in the interest of economy) when the cost of living drops, as it did during the years 1932–1937.

TRAINING FOR THE PUBLIC SERVICE.

So long as the spoils system reigned triumphant, there was no occasion for public service training. The spoilsman argued that any citizen in a democracy was competent to help govern his fellow citizens without training or experience. Why, moreover, should one train himself for a place in the public service, so long as it carried no security of tenure, and from which the incumbent was reasonably sure to be ousted in four years, if the fortunes of politics changed? Even with the advent of civil service regulations, it was not deemed essential that preliminary training should be required of those taking the competitive tests. But it was soon discovered that applicants who were obviously unqualified to pass any sort of rigid examination came forward in such numbers that a preliminary sorting out was necessary. So it became the practice to stipulate, in the announcements of the more technical tests, that applicants must have a designated

[1] Recent legislation allows employees to increase their retirement funds by contributing annual sums that do not exceed ten per cent of their salary; and also to substitute for the normal annuity a form called "joint and survivorship." The joint annuity was designed mainly for the benefit of widows. An act of 1942 made retirement compulsory at seventy, after fifteen years of service; optional for certain classes at sixty-two and sixty; and likewise optional at fifty-five, after thirty years of service, but with a reduced annuity.

minimum of education, training, or experience. Many of the competitions are now open only to those who have qualified themselves by a stated amount of formal education in law, engineering, public health, forestry, statistics, accounting, or some other specialty. This preparation is obtained at universities and professional schools; the national government maintains no institution for the training of those who desire to enter its civil service (as it does for its military and naval service), and it would be difficult to do so, because of the almost infinite varieties of preparation required. The suggestion has often been made that the federal government should establish a civilian West Point or Annapolis, and that the graduates of such an institution should be given commissions in the civil service. But because of the difficulties involved in training the many thousands of men and women who are needed each year by the government service in so many different specialties, it has been deemed better to leave this responsibility to the regular universities and colleges of the country.

Programs of study designed to prepare for the public service have been established at a considerable number of these institutions. Such preparation includes, more particularly, formal instruction in the field of public administration. But it is coming to be recognized that, while training in the technique of public administration is valuable, the important thing is that those who expect to make the public service a career, and to secure advancement in it, should first acquire a competence in some professional or vocational field. There are not many opportunities in the classified service for the bright young man, just out of college, who has taken a couple of courses in public administration and feels himself prepared to administer anything. What most worth-while government jobs call for is an accountant, a statistician, an engineer, a chemist, a forestry expert, a trained social worker, a health officer, a lawyer, or someone else who has become versed in at least one of a hundred different specialties. To possess a knowledge of public administration does not have much value unless one has this primary qualification as well. In other words, the need is, first of all, for a civilian competence in some field that the government can use.

VOCATIONAL COMPETENCE NEEDED FOR PUBLIC SERVICE.

Despite its shortcomings and handicaps we owe much to the merit system. The placing of appointments on a merit basis has been of undoubted advantage to the public service. It has dampened the ardor of office seekers and given the heads of government departments time for more urgent duties than the distribution of loaves and fishes. While no one can properly claim

OUR DEBT TO THE MERIT SYSTEM.

that civil service tests invariably select the best among a roomful of applicants, it is at least beyond peradventure that they do eliminate the worst — which is what the spoils system never did. In fact, our whole experience seems to show that there is no surer method of getting incompetents upon the public pay roll than the plan of asking politicians to recommend their friends — which is what the spoils system means. Unhappily, the laws have placed a serious obstacle in the way of the merit system by requiring that civil service tests shall be "practical" in character and directly related to the work which the appointee will have to do. This makes it necessary for the examiners to prepare tests which, in the nature of things, give an advantage to the candidate who has merely crammed himself full of facts, procedures, and other routine connected with the particular job, rather than to a candidate of greater ability and wider training. American civil service laws seem oblivious to the fact that men and women who enter the public service (in any but routine positions) do not expect to stay forever at their initial jobs. These appointees hope for promotion to better positions in the service, with more responsibility and greater scope for their all around abilities. Because of legal limitations which have survived since 1883, the civil service system is virtually forced to recruit appointees who can do a designated job rather than those who, by reason of unusual intelligence and broad education, are likely to prove themselves quickly available for promotion.

It ought to be self-evident that such examinations as the civil service laws now require test immediate fitness for a job rather than future promise or capacity for growth. Almost a century ago, in devising a system of competitive examinations for the civil service of British India, Lord Macaulay insisted that no place be given to such subjects as native languages and and institutions. These, he said, could be picked up later on or mastered in the course of local experience. It was his belief that ambitious young men, with good prospects of a successful career in private employment at home, would hesitate to spend a lot of time on Moslem law and Hindu social organization when, if they failed on the examination, they would find this knowledge virtually useless to them. Macaulay's plan for British India was later extended, in its essential philosophy, to the administrative branches of the civil service in Great Britain. It still has an important place in that system and is perhaps the chief feature which differentiates it from the American plan. Of this American practice, Professor Leonard D. White (himself a former member of the United States civil service commission) says:[1]

BUT IMPROVED APPLICATION OF IT DESIRABLE.

[1] *Introduction to the Study of Public Administration* (revised edition, New York, 1939), p. 305.

On any impartial view it is extraordinary that these examinations have gone their way with so little regard to selecting, year after year, the brightest secondary school and college or university graduates for public service careers. The examinations of the federal Civil Service Commission for junior professional and scientific positions and for junior civil service examiner are geared, somewhat inadequately, to college graduation, but these are rare exceptions. A career service places less emphasis on specific preparation, more on general education and mental alertness; less emphasis on practical experience, more on capacity to learn on the job and to progress. These considerations suggest the closer coordination of public education and public service.

NEW EXPERIMENTS WITH GENERAL TESTS.

During recent years some progress in this direction has been made. The United States civil service commission has inaugurated a significant experiment by establishing an eligible list of "administrative assistants." Competitions for places on this list are open only to young college graduates, and the tests are "intended to measure general alertness and capacity to learn different types of work readily." Their purpose is not merely to discover what the candidates happen to know about the work of some designated position, but what promise they can demonstrate in the way of becoming capable public officers, wherever they may be placed. Successful candidates are assigned as administrative assistants to whatever departments, bureaus, or offices happen to need young men or women of this type. Unfortunately, however, this experiment is not likely to achieve much permanent success unless the existing rules relating to veterans' preference are changed. During many years in the future, unless the scope of these rules is narrowed, it is to be feared that young men and women in the annual crop of college and university graduates will have little chance of any appointments in any branch of the national civil service as against the millions of both sexes whose service, not necessarily in war but in wartime, will have automatically qualified them for places near the top of the eligible list.

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CHAPTER XVII

THE SENATE: ITS ORGANIZATION

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. — *U. S. Constitution.*

THE "UPPER" HOUSE.

It was by no mere slip of the pen that the first article of the Constitution, in establishing a Congress of two chambers, gives the Senate priority of mention. The men who framed this document — most of them — looked upon the Senate as the backbone of the whole federal system. They intended it to be a body which would give the states, as states, a dominating share in the government of the nation. They had in mind something that would be more than a second chamber or a co-equal branch of Congress. To that end they gave the Senate some very important special powers such as the approval of treaties, the confirmation of presidential appointments, and the trying of impeachments — powers in which the House of Representatives was given no share.

A TERMINOLOGICAL INEXACTITUDE.

The Constitution invariably uses the term "Congress" in its correct sense, but the average American does not. By Congress he means, in most cases, the House of Representatives. He will tell you that somebody served three terms in Congress and then went to the Senate. Or he will remark that there are too many members in Congress when what he really means is that the House of Representatives has grown too large. This habit of using political terms carelessly ought to be avoided because a lack of precision in language often leads to a lack of precision in thought. A political misconception is never so firmly entrenched as when it becomes rooted in the common speech.

The Congress of the United States is a bicameral legislative body, but its American predecessors were not of that type. The Continental Congress, which functioned during the Revolutionary War, consisted of a single chamber; and the same is true of the Congress of the Confederation during its brief span of existence. But the results in both these cases

left much to be desired, and it was quickly decided by the constitutional convention of 1787 that the new government should provide a legislative body of two chambers. This decision was reached practically unanimously, as it seemed inadvisable to vest in a single chamber the great legislative authority which would ultimately be exercised by the new federal government. The makers of the Constitution were also influenced, no doubt, by the fact that most of the states, in setting up their new governments after the Declaration of Independence, had adopted the bicameral system for their state legislatures. All except Georgia and Pennsylvania had done this.[1]

WHY THE DOUBLE-CHAMBER SYSTEM WAS FIRST ADOPTED:

1. IN THE INTEREST OF SAFETY.

Furthermore, there was a strong desire to provide, in the new national government, some hostage for the future integrity of the states. Otherwise the time might come when a single house, directly elected by the people, would crowd the state legislatures out of the way and usurp the whole field to itself. This could best be prevented by giving the states, as states, definite control over one of the new federal chambers. In other words, the adoption of the double-chamber principle was dictated, in part at least, by the feeling that there were two elements to be represented, namely, the states as states, and the people of the country without reference to the states in which they lived. Accordingly, the state legislatures were to choose the senators, while the people would elect the members of the House of Representatives.

2. TO GUARD AGAINST LEGISLATIVE CENTRALIZATION.

The bicameral system, again, partly reflected a strong desire for stability in government. In 1787 the country was tired of strife, turmoil, and uncertainty. It had been given its new deal and was satisfied. For twelve years it had been keyed up by one excitement after another; the news that dribbled through from one state to another sounded like *communiqués* from a battlefront. The leaders of the people wanted a government that would keep the country at peace, maintain order, protect private property, and let the citizen alone. All this called for the creation of a second chamber which would serve as a checkrein on a volatile body of legislators directly chosen by the people for short terms, which the House of Representatives was destined to be. Members of this upper chamber would be chosen in a different way and would reflect a more deliberate point of view. Incidentally, there was the practical consideration that only by setting up two chambers could the

3. TO ENSURE CONSERVATISM.

[1] In addition, Vermont entered the Union in 1791 with a single chamber. But Georgia abandoned the single-chamber organization in 1789, Pennsylvania, in 1790, and Vermont, in 1836.

terms of the first compromise of the great convention be carried into effect.[1] It is true that a double-chamber system had been agreed upon before the quarrel which led to this compromise became acute, but the compromise sealed the matter beyond the possibility of reopening it.

So, a Senate and House of Representatives were established to form the Congress of the United States. It is of interest to ask whether this arrangement has matched up to the expectations of the men who planned it in 1787. For the most part it has. The House has been a reasonably good mirror of the popular mind, although at times inclined to drive ahead too fast. As long as members of the Senate were chosen by the state legislatures, as was the case down to 1913, they represented a more conservative group, but since the adoption of the seventeenth amendment (1913), with the senators elected by direct popular vote, the differentiation between the two Houses, in their general inclination, is no longer what it used to be. Today one cannot say that either chamber is likely to be more conservative or more radical than the other. It remains a fact, nevertheless, that the necessity of obtaining approval from two chambers is something of a deterrent to hasty and ill-considered legislation even when both are politically like-minded.

HAVE THE REASONS PROVED GOOD?

The philosophy of representation in the Congress of the United States has remained unchanged since 1787, despite the seventeenth amendment. The people of the states, as such, are equally represented in the Senate — each state having two senators. The people of the nation, on the other hand, are represented by a varying number of representatives in the lower branch of Congress, the House of Representatives. But representatives, like senators, are apportioned to states and not to congressional districts. Then the state legislatures, acting in conformity with federal law, decide how the congressional districts shall be laid out. They may fail to act because the two houses disagree, or the governor may interpose an effective veto. In either case, some or all of the representatives will be elected at large, this depending on whether the state delegation has been enlarged or reduced.[2] It is not wholly accurate, therefore, to say that senators are elected by states while representatives are *always* elected by districts.

THE CONSTITUTIONAL BASIS OF REPRESENTATION IN CONGRESS.

The Constitution, in its original form, provided that senators should be chosen by the legislatures of the several states. In adopting this method, two purposes were in view. First, there was a hope that the senators, chosen in this way, would constitute a body of men who had

[1] See pp. 42–43. [2] See p. 311.

gained political experience in their own states — men who had served in state legislatures or in other public offices. Demagogues might win at the polls and get seats in the House, but they would not find it easy to cajole the state legislatures by oratory and promises. Thus, the Senate would serve as a check upon executive dictatorship, if the President should ever try to become a dictator, and it would also be a counterfoil to the dictatorship of a popular majority, if the House should ever succumb to mass emotion, as expressed at the polls. "Give all the power to the many," said Alexander Hamilton, "and they will oppress the few. Give all the power to the few, and they will oppress the many." Safety could be achieved, therefore, by having senators chosen by the few and representatives by the many.

REASONS FOR THE ORIGINAL METHOD OF CHOOSING SENATORS:

1. THE DESIRE FOR EXPERIENCED LAWMAKERS.

In the second place, there was a very practical reason for entrusting the selection of senators to the legislatures of the several states, namely, that this would guarantee the permanence of these legislatures themselves. It would provide an assurance that the state governments would never be snuffed out. This possibility was feared by a great many people in 1787, and, as a way of guarding against it, the framers of the Constitution geared an important wheel in the national machine directly to the mechanism of state government. This meant that the state legislatures could never be eliminated without bringing down one branch of Congress as well. For, if the time ever came when there were no state legislatures, there could be no senators. This link between the Senate and the state legislatures was broken by the seventeenth amendment in 1913, but not until the state legislatures had lessened their apprehension of being crowded out by the expansion of federal power. The happenings of the past thirty years, however, have resurrected their fears to some extent.

2. TO GUARANTEE THE PERMANENCE OF STATE LEGISLATURES.

These reasons for giving the state legislatures the right to elect the senators were good reasons in 1787, and the practice of legislative election encountered very little objection for many years thereafter. During more than a century the state legislatures did the choosing, but not always in a way that met with popular approval, and in time a feeling developed that senators, as well as representatives in Congress, ought to be chosen by direct popular vote. Some agitation for such a change began as early as Andrew Jackson's day, but it did not make much progress until after the Civil War. Then it gained momentum from several sources. The country began to feel that there was too much "invisible government" in the selection of senators, too much log rolling, too much spending of money, too much bossism.

OLDER PLAN OF CHOOSING SENATORS.

There were good reasons for this feeling. The real selection was not usually made by the legislature in open session, but by a secret caucus of the majority members. Often it was the result of deals and dickers which would not bear the light of day. Partisan service, or the support of some great financial interest, without any other qualification, placed many senators in their seats. The dictation of political bosses counted for more with members of state legislatures than the promptings of their own judgment or the call of public opinion. Sometimes, moreover, the process of election broke down, ballot after ballot being taken for months in a state legislature with no one obtaining a clear majority. In this way a state was occasionally deprived of its representation in the Senate over considerable periods of time.

OBJECTIONS TO IT.

As a result of these various objections, the old method of choosing senators became steadily more unpopular, and proposals for a change in the Constitution to permit direct election by the people gained increasing support during the closing decades of the nineteenth century.[1] Several times the House of Representatives passed, by the requisite two-thirds vote, a proposition to submit such an amendment to the states for their approval, but the Senate refused concurrence until the pressure of public opinion ultimately compelled it to give way in 1912. Then the seventeenth amendment was submitted and adopted. It provides that senators shall be chosen directly by the voters of the several states, not by the legislatures. But the six-year term and the requirements for eligibility remain as before. A senator must be at least thirty years of age, a citizen of nine or more years' standing, and, at the time of his election, an inhabitant of the state from which he is chosen.

ITS ABOLITION.

One third of the Senate's membership is renewed every two years; hence no state elects both its senators in the same year, unless some unexpected vacancy occurs in one of the senatorships. The choice is made by the voters at the regular state election. But Congress itself may at any time prescribe the method of conducting this election;[2] and this power extends to the nomination of candidates as well as to the election itself.[3] In practice, however, candidates for election to the Senate are nominated according to whatever procedure is provided by state law — in most cases by direct

THE NEW PLAN.

[1] George H. Haynes, *The Election of Senators* (New York, 1906).

[2] Article I, section 4, of the Constitution.

[3] United States *v.* Classic, 313 U. S. 299 (1941). Twenty years earlier, in Newberry *v.* United States (256 U. S. 231), the court had thrown some doubt on the power of Congress to regulate primaries.

primaries, but sometimes by conventions. Ultimate authority in this matter rests with Congress; but as long as Congress does not intervene, the states are free to lay down the methods of nomination and the procedure at elections. They may even limit, or leave unrestricted, the amount of money that an aspirant for the nomination may spend in his pre-primary campaign.

THE SENATE MAY REFUSE TO SEAT A MEMBER-ELECT.

According to the Constitution, the Senate is given the right "to be the judge of the elections, returns, and qualifications of its members." This means that a newly elected senator cannot take his seat until the Senate, either by affirmative action or by acquiescence, has adjudged him to have been properly elected and qualified. Not until then is the newly elected senator permitted to take the oath of office. On more than one occasion the Senate has declined to permit the taking of this oath by persons whom it deemed to have gained election by improper means. Thus Frank L. Smith of Illinois and William S. Vare of Pennsylvania were elected to the Senate in 1926 by voters who were reasonably well aware that large expenditures had been made on their behalf in the primaries.[1] In neither of the two states did the law place any limit upon the size of primary campaign funds. Yet the Senate, by a large majority in both cases, refused these two senators-elect the right to take their seats.

IS THIS POWER BEING ABUSED?

This power to refuse anyone a seat because a legislative body does not like the way in which he was elected might become an open door to serious abuses. If a majority in the Senate can refuse the oath of office to any newly elected member because it does not approve his electioneering methods, there is no good reason why it cannot refuse the oath on any other ground — because the newly elected senator is a socialist, a pacifist, an "economic royalist," or a political boss. The intent of the Constitution is that each state shall choose its senators, subject only to the qualifications which the Constitution lays down, and in accordance with methods of election which the federal laws prescribe. Was it ever intended to give the Senate a right to veto a state's selection by refusing the oath of office to anyone whose political record might be disapproved by a majority of the senators from other states?

[1] Smith spent $253,000; his opponent, McKinley, a much larger sum. In behalf of the Vare-Beidelman ticket (Beidelman sought the office of governor) the expenditure ran beyond $800,000; for an opposing ticket the figure was roughly $1,805,000. One senator said: "Mr. Smith and Mr. Vare may have the law on their side, but we have the jury. No man in politics will dare to seat either of them, regardless of the right of the Senate to delve into a state primary." See George H. Haynes, *The Senate of the United States: Its History and Practice* (2 vols., Boston, 1938), Vol. I, pp. 144–154.

FILLING VACANCIES.

Under the provisions of the seventeenth amendment, when a vacancy occurs through the death, disqualification, or resignation of a senator from any state, the governor "shall issue" a writ of election to fill such vacancy. But this requirement, although mandatory in form, is discretionary in fact. There is no process whereby a governor can be compelled to issue such a writ unless he chooses to do so. And, when the date for a regular election is not too far away, he usually issues no writ but makes a temporary appointment. This he may do, under the provisions of the amendment, if the legislature of his state has so empowered him, as virtually all the state legislatures have done.

EQUALITY OF REPRESENTATION IN THE SENATE MUST REMAIN.

The seventeenth amendment made no change in the equal representation of the states, although, with the present great disparity of population among the various commonwealths, this equality has now become a conspicuous anomaly. Nevada, with 110,000 population, has two senators, while New York, with nearly 13,500,000, has the same number. The population of Illinois is about the same as that of all the New England states combined; but Illinois has two senators, while New England has twelve. Put together the states of Arizona, Delaware, Idaho, Maine, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. Here are fifteen states, controlling almost one third of the Senate. Yet their total population is only about seven per cent of the national figure. On the other hand, the five most populous states of the Union (New York, Pennsylvania, Illinois, Texas, and California) have a third of the national population, yet elect only ten senators out of ninety-six.

ALTHOUGH IT IS NOT CONSTITUTIONALLY BINDING.

All this is an outcome of the principle that states, like men, are created equal. Nevertheless, the provision for equality was the result of a bargain between the larger and the smaller states in 1787 and was intended to be irrevocable. As evidence of this, the Constitution contains an express guarantee that no state, without its consent, shall ever be deprived of its equal representation in the Senate.[1] It is true, of course, that if one constitutional amendment repealing the restriction and a second changing the equal representation of the states in the Senate were to be passed by a two-thirds vote in both Houses of Congress and ratified by three fourths of the states, both would be held valid; but there is hardly a chance that three fourths of the states would ratify either proposal. The smaller states

[1] Article V.

set a high value upon their prerogative of equal representation, and there are enough of them to prevent the adoption of any amendment which would take it away.

THE EXISTING ANOMALY HAS SOME MERITS.

In any event, one should not be too much disturbed by anomalies in government. Every country has its share of them. Indeed, it might almost be said that the better a country's government, the less logical its structure is likely to be. Even if it were possible to rationalize the basis of representation in the United States Senate, there is no certainty that such action would prove advantageous in the long run. The Senate represents areas; the House represents numbers. A majority of the House membership comes from ten states of the Union. Were it not for the principle of equal representation in the Senate, these ten states could control the legislative policy of the nation. But, under the present arrangement, it takes twenty-five states to control a majority. The country east of the Mississippi and north of Mason and Dixon's line dominates the House, but it does not control the Senate. A combination of West and South can outvote it there. Thus, the principle of balance and counterpoise, both numerical and sectional, is established and preserved.

IT CAN BE DEFENDED.

One should not think of Congress as the parliament of a homogeneous nation, but rather as the governing organ of a league of states. For in the United States we have a much greater sectional diversity than most Americans realize. North Dakota and Louisiana are under one flag, but they are as unlike in physical conditions, in social texture, and in economic interests as are Denmark and Portugal. The Senate represents this diversity, within the borders of the land, in a way that the House does not. It is not people alone, but land and people, that make a nation. New Jersey does not necessarily have twice the importance of Kansas in the nation's life because she has twice the population. From this point of view the equal representation of the states can be defended.

ORGANIZATION OF THE SENATE.

The Senate of the United States holds its regular sessions each year in its own chamber at the national capital. It may also be called by the President in special session, even when the House of Representatives is not sitting. This is because the Senate has some special functions which are not shared by the other branch of Congress; namely, the trial of impeachments, the confirmation of presidential appointments, and the approval of treaties. Such special sessions have been called on a number of occasions to confirm treaties; but no special session of the House of Representatives has ever been summoned without the Senate being also called, for there is nothing of

general importance that the House can do without the Senate's concurrence.

ITS PRESIDING OFFICER.

By the terms of the Constitution, the Vice-President of the United States is the Senate's presiding officer, and he possesses the customary duties of a presiding officer. But he appoints no committees and has no vote, except in the case of a tie. In the earlier days of the Union, when the Senate was a small body of less than thirty members, tie-votes were not uncommon; but nowadays, with the membership increased to ninety-six, the Vice-President rarely gets the opportunity to give a casting vote. In the absence of the Vice-President, the Senate elects a president pro tempore, who continues to vote as a regular member, but has no power to break a tie-vote. It also chooses its other officers, sergeant-at-arms, chaplain, and clerks.

ITS PROCEDURE.

The Senate makes its own rules of procedure,[1] and, on the whole, these rules are simple, far more so than those of the House. They require that every bill or joint resolution shall receive three readings before being passed, but the first two readings are merely nominal and are given before the bill is referred to the appropriate committee. The real contest, if any, comes upon the occasion of the third reading, when the bill is considered in committee of the whole, and amendments may be offered. No general priority is given in the Senate, as in the House, to any class of measures, except that appropriation bills have a certain precedence. Debate in the Senate is not limited, as in the House; there is ordinarily no limit on the time that a senator may occupy, and no way of bringing things to a vote by moving the previous question. But it is possible for the Senate, by a two-thirds vote, to restrict the amount of time that the debate on any measure may occupy.[2]

EFFECT OF PROCEDURE UPON WORK.

The Senate is a somewhat less docile body than the House. There are floor leaders who have charge of measures, but they do not dominate the debates as floor leaders do in the House of Representatives. The senators are an individualist group; most of them have had a good deal of political experience; they know their way around (or think they do) without having to be directed. The rules of the Senate, moreover, do not help the maintenance of party discipline.

[1] The Senate's rules are permanent. They do not have to be readopted at the beginning of each Congress, as is the case with the rules of the House of Representatives. This is because the Senate is a continuous body, with two thirds of the membership holding over from one Congress to another.

[2] Senate Rule, No. 22 (adopted in 1917). The rule provides that any sixteen senators may file a petition to close the debate, and when the Senate votes by a two-thirds majority to do so, no dilatory motions are in order and no amendments save by unanimous consent. This rule causes the debate to be limited to as many hours as there are senators desiring to speak.

Being a relatively small body, the need for firm leadership is not so urgent as in the House, which is over four times as large. Most of the Senate's meetings are public, but it may vote at any time to go into "executive session" behind closed doors. This it sometimes does when the confirmation of appointments is under discussion. Treaties, on the other hand, are considered in open session.

ITS COMMITTEES.

Like all legislative bodies, the Senate does a large part of its work through committees, of which it now has thirty-three.[1] Some of them are important and have substantially the same designation and jurisdiction as the chief committees in the other chamber; others have only perfunctory work to do and rarely meet at all. The most important committees of the Senate are those on finance, appropriations, foreign relations, the judiciary, naval affairs, and interstate commerce. The first two have the consideration of all measures affecting revenue and expenditures respectively; the next two owe some of their importance to the fact that all the President's appointments to the diplomatic service and to federal judgeships are referred to them. Likewise, the committee on foreign relations considers all treaties before they are discussed by the Senate as a whole. The committee on interstate commerce has the preliminary consideration of measures relating to the supervision of railroads and other interstate utilities. Senate committees contain from three to twenty-four members; every senator is sure to be assigned to several committees and often serves on five or six.[2]

HOW COMMITTEES ARE CHOSEN.

The choice of Senate committees is made at the beginning of each new Congress, but the work of selection has been reduced to a formality. According to one of its rules, the Senate shall "proceed by ballot to appoint severally the chairman of each committee, and then, by one ballot, the other members necessary to complete the same." For the past century, however, this rule has always been suspended by unanimous consent. The Senate merely accepts the proposals which the Democratic and Republican caucuses, after receiving the reports of their respective committees on committees, have agreed upon. Before a list of committee assignments can be drawn up, however, the party in control must decide how many Democrats and how many Republicans shall serve on each committee. Invariably it will insist upon a safe margin, and in any case upon a ratio higher than its relative strength in the Senate would justify. Thus, while the Democrats formed less than 60 per cent of the Senate in 1944, on all important committees

[1] Before 1921 there were 73 committees.

[2] In 1944 almost two fifths of the Senators sat on five standing committees; almost one fifth, on six. At the same time more than half sat on one or more of fourteen special investigating committees. Senator Mead of New York sat on six standing and four special committees.

their percentage ranged from 66 to 70. In no case did it sink below 61. In assigning places to a new senator, the committee on committees will consider his experience, aptitudes, and personal wishes; but still more weight may be given to factors that make for harmonious cooperation within the party. Thereafter he rises towards the top — towards the coveted post of chairman — wholly through length of service.

OPERATION OF THE SENIORITY RULE.

This rule of seniority, in its operation, has sometimes led to widespread criticism. In 1917, Senator Stone of Missouri became chairman of the committee on foreign relations in spite of his pro-German attitude; and in 1941, Senator Reynolds of North Carolina became chairman of the committee on military affairs in spite of his having opposed the lend-lease bill, the repeal of the arms embargo, the extension of the draft, and other items in the President's program of national defense — in both cases because of seniority. Advancement by seniority is said to discourage able men from entering or remaining in the Senate; it also avails, at times, to place in positions of authority men who are not in sympathy with the leaders of their party. On the other hand, long experience in a certain field may offset individual mediocrity. Under any system other than that of seniority, the selection of chairmen, every two years, might be the result of log rolling and factional combinations. An occasional departure from the seniority rule, nevertheless, might be advantageous.

THE STEERING COMMITTEE.

The party caucus or "conference" [1] is not an official Senate committee. It is a committee of each political party, not of the Senate. The same is true of the steering committee which is maintained by each political party in the Senate. These steering committees, while not an innovation, have shown new vitality in the past twenty years. But they still function without conspicuous success, because individual senators cling to their tradition of independence and resist any attempt to whip them into line. So a steering committee cannot dictate to them, but must gain its ends through concessions and persuasion. The majority party relies more heavily upon its committee, appointed by the chairman of its own caucus or conference — relies upon it to determine what measures need most urgently to be passed and then to "steer" those measures through the Senate; but the minority also finds such a "general staff" of value in devising defensive tactics.

The unique freedom of debate which prevails in the Senate has some advantages in that it encourages full discussion; it gives minorities a chance to fight for compromise and to hold up action until public

[1] In 1913 the Republicans formally adopted the term "conference" in order to disarm critics of "gag rule"; and in recent years the Democrats have shown a preference for it also.

opinion has had an opportunity to make itself felt. But so great a latitude in debate may easily be abused, and it sometimes has been abused. It has occasionally given a factious minority the opportunity to wear out the endurance of the majority by conducting a "filibuster," as it is called. When the Senate's session is drawing to its close, this permits a relatively small group of senators to defeat a measure by resorting to dilatory tactics (such as making long speeches, proposing amendments, demanding roll calls, and so forth), and many measures have perished in this way. Indeed it can fairly be said that legislation in the closing days of the Senate's session requires virtually unanimous consent. Everyone who is old enough will remember, for example, how "a little group of wilful men in the Senate" (as President Wilson called them) determined to prevent the arming of American merchant vessels for self-protection in the spring of 1917, when German submarines were sinking neutral ships. This action caused the Senate to adopt its famous, but not altogether effective, Rule No. 22 which makes possible the placing of a one-hour limit on speeches.[1]

FREEDOM OF DEBATE IN THE SENATE: ITS MERITS AND DEFECTS.

The filibuster has been harshly condemned, but there are times when it is justified. It has been condemned as abusing freedom of speech, as derogating from majority rule, and as lowering the prestige of the Senate. Occasionally it has made the Senate appear ridiculous. On one occasion, Senator Tillman of South Carolina spent hours in reading *Childe Harold* to his fellow senators and threatened to continue with other compositions of Byron, including the somewhat risqué *Don Juan*. Senator Heflin of Alabama once regaled the Senate with his own poems, which were not masterpieces, and followed this by reading dozens of telegrams and letters from his admiring friends. Shortly before his assassination, Senator Huey Long of Louisiana entertained the Senate, or a few of its members, by discoursing at length on recipes for "potlikker," fried oysters, coffee, and turnip greens. But even he did not equal the performances of the earlier Senator Robert M. La Follette of Wisconsin, who delighted in reading to the Senate prosy passages from the reports of the interstate commerce commission. On one occasion La Follette held the floor for eighteen hours and 23 minutes, which is believed to be a record, although, in the filibuster against the ship purchase bill of 1915, six obstructionists spoke for more than eleven hours each. So many bills perished at the end of one Congress, because of a filibuster, that Vice-President Marshall, it is said, adjourned the Senate *sine deo* instead of *sine die*.

ABUSED BY OBSTRUCTIONISTS.

[1] See p. 278, footnote.

In some quarters, however, the filibuster has been defended. Somebody once characterized it as an appeal "from Philip drunk to Philip sober," in other words, from the caprice of a transient majority to the court of mature public opinion. And filibusters, it is true, have occasionally defeated bills which would have served little purpose except to arouse bitter sectional resentment. A senator once asserted that filibusters have "never kept any desired or desirable legislation off the statute books." That is probably true — in the long run. Rule 22 is still on the books, but it has not proved effective in limiting debate. Allowing each senator to speak for not more than an hour, it has been enforced only four times in the past quarter of a century, and its enforcement has been denied (through lack of a two-thirds vote) no fewer than nine times. On the other hand, the twentieth amendment has tended to limit dilatory tactics. It abolished the old short session,[1] and in a long session filibustering is likely to wear itself out.

YET THE FILIBUSTER HAS SOME VIRTUES.

Notwithstanding the opportunity for long speeches, the Senate's debates do not now reach the high standards of bygone days — the days of Webster, Clay, Calhoun, Hayne, Benton, Douglas, Seward, and Sumner. Speeches of sterling quality are still occasionally delivered when some matter of special solemnity provides the occasion; but senators nowadays do not set out to convert their colleagues by eloquence. If a senator has the urge to unburden himself of a great oration, he chooses a banquet or a convention, with a radio hookup, as the best place for his effort. Strangely enough, it is sometimes easier for a senator to reach the ears of the people than those of his own colleagues. Incidentally, it is not the practice of the Senate, as it is of the House, to give members by unanimous consent the right to "extend their remarks," and under that pretext publish in the *Congressional Record* speeches which they have not delivered; but it does give "leave to print" public addresses, newspaper articles, documents, correspondence, etc. Then the senator has copies struck off by the government printing office and sent to people in his own state. Nowadays he pays for these copies (although not for the postage) and prints on them, in order to keep his record clear, the legend "Not printed at the public expense."

QUALITY OF THE DEBATES.

The party whip cracks as frequently in the Senate as in other legislative chambers, although not so sharply. Its custodian is the caucus or conference. Each party majority or minority (as already mentioned) has its own caucus or conference, made up solely of its own members, and through that agency tries to find a

INFLUENCE OF THE PARTY SPIRIT.

[1] See p. 316.

common basis of action. The majority senators, whether Republicans or Democrats, agree as to the measures which they will support; the minority members, on the other hand, map out their counter-operations, deciding whether to oppose, offer amendments, filibuster, or to let things go through.

THE CAUCUS SYSTEM IN THE SENATE.

Democrats, on the whole, have submitted to control by the caucus more readily than have Republicans. Thus, by a rule of 1903, all Democratic senators were bound by a two-thirds vote of the caucus on pain of being excluded from it in the future. Thirty years later they made it a rule to be bound by a majority vote of the caucus to support all measures of the then-existing Roosevelt administration on final passage. Republicans have been more lenient. During a debate on "caucus domination" in 1915, Senator Gallinger of New Hampshire asserted that, throughout his service of almost twenty-four years, the Republican caucus had never sought to bind its members on any question whatever. Not long afterwards the binding force of resolutions adopted by the Republican conference was abolished altogether. But there are other, if less obvious, ways of imposing ecclesiastical discipline than by burning the heretics. If a majority caucus, through the medium of free debate and persuasion, can induce its members to cooperate in support of a measure, the ultimate issue is virtually sealed. The majority, being thus pledged by caucus resolution to stand together, can ensure its enactment. Not infrequently, however, the Senate includes a number of insurgents who will not attend any caucus and hence are not bound by what the caucus of either party may do. These intractables may caucus by themselves, or they may leave each rebel to decide for himself. If there are enough of them, as sometimes happens, they can force a regular caucus to make compromises with them. Sectional allegiance among the senators often proves stronger than party allegiance.

PRIVILEGES AND IMMUNITIES OF SENATORS.

The Senate possesses the customary rights of a legislative body, and its members enjoy the usual immunities. They are privileged from arrest on civil process during their attendance, in going to, and in returning from the sessions. For what a senator may say in the course of a debate, moreover, the Constitution provides that he "shall not be questioned in any other place"; in other words, he is not subject to the ordinary law of libel as administered by the courts. But the Senate itself can punish a member for disorderly conduct and, by a two-thirds vote, even expel him. It may compel the attendance of absent senators, may conduct investigations, may summon witnesses, and, in the event of their refusal to appear or

answer questions, may cite them to the courts to be punished for contempt. This power to conduct investigations has been freely used by the Senate in recent years through the appointment of investigating committees. The scope and importance of this power will be explained a little later.[1]

THE PLACE OF THE SENATE IN AMERICAN POLITICAL HISTORY.

In political influence and prestige, the Senate was, for a time, inferior to the House. The House, in the early days of the Republic, took the initiative in legislation of all kinds, while the Senate devoted its time to revising the measures which came up from the lower chamber rather than to originating bills of its own. It was a small body, regarded by the public as a council of provincial notables which young statesmen of brilliant political talents did well to avoid.[2] There was a common impression that senators had little freedom to decide questions for themselves, but that, like envoys, they merely followed the instructions of their own state legislatures.

1. FROM 1789 TO 1830.

But during the era of Andrew Jackson, this situation began to undergo a change. The abolition of the congressional nominating caucus, which the House through sheer weight of numbers always controlled, reduced the influence of that body.[3] The Senate began to come into its own. Men of power and reputation entered the Senate during the era which intervened between the inauguration of Jackson and the Civil War — Webster, Clay, Calhoun, Hayne, and others. The outstanding political questions of this epoch were connected with slavery and states' rights; hence the Senate, as the chamber representing the states, became the chief forum of controversy.

2. FROM 1830 TO 1870.

After the Civil War came the inevitable reaction. By its undue emphasis upon "senatorial courtesy" and its attempt to exercise a virtually complete control over presidential appointments, the Senate overreached itself. Presidents Grant and Garfield each took a hand in clipping its wings: the former, by rebuffing its claims to any control over removals from office; the latter, by defying its rule of courtesy.[4] Questions of economic policy, moreover, now came to the front, and in its handling of these the sectional spirit of the upper chamber cropped out too conspicuously. The growth of large corporations and of great fortunes brought new elements into its membership. Senators who owed their selection either to personal wealth or to the fact that they were backed by railroads or other corporate interests

3. FROM 1870 TO 1913.

[1] See p. 302.

[2] Henry Jones Ford, *The Rise and Growth of American Politics* (New York, 1898), pp. 260–261.

[3] For an account of this caucus and its abolition see p. 135.

[4] See p. 192.

began to invade the upper chamber and to dominate it. With this development the Senate began to stamp itself upon the public imagination as the stronghold of vested interests and the foe of popular rights.

It was this feeling that eventually led to a change in the method of electing senators, as provided by the seventeenth amendment. The older group of senators, so closely allied with big business, began to drop out, presently giving place to men of more "progressive" outlook, as they liked to put it. During the past twenty-five years it can hardly be said that the Senate has shown itself to be the more conservative chamber. It has kept within its fold a very influential group of liberals from both parties.

4. SINCE 1913.

Among the whimsical political philosophers of a decade or two ago, the late Will Rogers had no equal. He used to say that "it's easy to get a reputation as a humorist: just keep your eye on the Senate and report the facts." But it has not been quite so bad as that. The Senate is unduly tolerant of rebels, obstructionists, dissenters, and even rabble-rousers of the Ben Tillman and Huey Long variety, all of which has tended to create a popular misapprehension concerning the normal quality of its debates. Moreover, the Senate's relations with the nation's chief executive frequently occasion bizarre headlines in the newspapers; although, for the most part, these two branches of the government work together in harmony. Since the Senate is a sharer in the executive power, it naturally becomes strong when a weak-willed President occupies the White House; and the converse is also likely to be true. There has never been a time, however, and probably never will be, when the second chamber of Congress can be termed a secondary chamber. The Senate is not likely to meet the same fate that the House of Lords has encountered in the parliament of Great Britain. Its constitutional powers are too far-reaching.

THE SENATE'S FUTURE.

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CHAPTER XVIII

THE SENATE: ITS SPECIAL FUNCTIONS

> We shall exult if they who rule the land
> Be men who hold its many blessings dear,
> Wise, upright, valiant; not a servile band
> Who are to judge of danger which they fear,
> And honor which they do not understand.
>
> — *Wordsworth.*

The Senate, as has already been said, was intended to be more than an upper house of Congress. The framers of the Constitution designed it to be, in a sense, the American counterpart of the English privy council; that is, a body whose "advice and consent" would be required for certain executive actions. And Washington, during his first term as President, expected that the Senate would act as an advisory council, for he sought to have it join with him in considering certain treaties with Indian tribes. The Senate at this time had only twenty-six members, and was not too large for confidential discussions. But the senators did not like the idea of having the President sit with them in executive session and declined the proposal. So Washington gave up his plan of personal conferences with the Senate and substituted the practice of sending business to it in written communications. Thereupon the Senate ceased to be anything like a privy council. Its prerogative became one of consent rather than advice.

Nevertheless, this drift of emphasis may easily be exaggerated. Before making a nomination, the President does consult the senators of his party from the state concerned, or the representatives, or the national committeeman; and, in the preliminary stages of treaty-making, he may give a few senators some share in the negotiations. In any event he is very unwise if he does not keep in close touch with the members of the foreign relations committee. On the other hand, senators have little reason to grumble that their constitutional right to advise as well as to consent seems to have been abridged. It was the Senate itself which set the precedent a great many years ago.

APPOINTMENTS[1]

The appointing power is one of the greatest powers that an executive can have — too great, it was felt, to be vested in the President alone. An unscrupulous President might use it to perpetuate himself in office. He might fill the administrative positions in the national government with men whose appointments proceeded, as Hamilton said, "from state prejudice, from family connection, from personal attachment, or from a view to popularity." [2] In other words, he might use the appointing power to build up a personal machine. So the Senate was given a share in the appointing authority for the higher offices. Provision was made, however, that Congress might by law vest the appointment of "inferior" officers in the President alone, or in the courts of law, or in the heads of departments. In such cases the consent of the Senate is not required.

SPECIAL FUNCTIONS OF THE SENATE:

1. THE CONFIRMATION TO APPOINTMENTS.

With respect to the higher offices, nomination must precede appointment. The President has virtually unrestricted freedom of choice when nominating judges of the Supreme Court or cabinet officers or ambassadors. But, when the functions of an office are discharged within a single congressional district or within some larger area of a state, he is expected to consult, respectively, with the representatives and senators of his own party; or, failing them, with the national committeeman, or other political leaders of the state. Thus the federal patronage enjoyed by a senator may be extensive. In Indiana, some years ago, one Republican senator in a Republican administration, virtually controlled not only the state-wide offices, but also the offices in eleven of the thirteen congressional districts, these having gone Democratic. The President must rely upon local advice; he cannot visit every state of the Union, find out the reputation of candidates in their own communities, or cross-examine them as to their fitness. Yet good citizens wonder that a conscientious President should sometimes pick for high office mediocrities who are little respected where they are best known. The reason is that he does not, in reality, do the picking. Of course, when recommendations reach him, he may have some inquiries made; for, if he is a sophisticated politician, he must know that, in the pursuit of public office, leg muscle and effrontery often count for more than fitness and character.

NOMINATION BY THE PRESIDENT.

[1] The role of the Senate in making appointments has already been discussed in connection with the powers of the President. See pp. 191–192.

[2] *The Federalist*, No. 76.

In any event, the President sends to the Senate his nominee for the post and takes all the responsibility for it. The nomination is at once referred to the appropriate committee. If it is the nomination of a federal judge, it goes to the judiciary committee; if that of an ambassador, to the committee on foreign relations. These committees may, and often do, assign the nomination to subcommittees for investigation. If there are objections to the nominee, the committee (or subcommittee) hears such objections, and in due course a report is made to the whole Senate. Then comes the vote to consent or to refuse consent. After the vote has been taken, two days of actual session must be allowed to elapse before the action of the Senate is communicated to the President. This provision in the Senate's rules is intended to afford time for reconsideration if the senators so desire.[1] The Senate is not bound to follow the recommendations of its committees in the matter of confirming appointments; but it does so, except in rare instances. If the Senate's approval is refused, the President may submit the same nomination a second time, but this is not usually done.

SENATORIAL PROCEDURE.

Rejections have not been numerous, on the whole, but they have at times developed considerable bitterness, especially when the President is determined to force his nominations through. Much depends, of course, upon whether the Senate contains a majority representing the same political party as the President. It is now generally conceded, however, that the responsibility for making the original selections ought to rest upon the President's shoulders, and that the Senate should not impair this responsibility by refusing to allow him to have the subordinates whom he desires. It should, and usually does, content itself with adverse action in those cases where it believes that the President has proposed someone with a dubious past record or present reputation. It is not the Senate's business to guarantee fitness, but to keep the unfit out. Only the more important appointments, in any event, require any action from the Senate. The majority of federal positions are now filled by the heads of departments, usually under civil service rules, as has been already explained.[2]

THE REJECTIONS.

Has the requirement of senatorial confirmation proved to be a wise one? It has divided the responsibility and has sometimes tied the Presi-

[1] A peculiar case of reconsideration arose in 1931. The Senate, having confirmed three nominations to the federal power commission and so informed President Hoover, decided, some days afterward, to reconsider its action. Hoover refused to return the documents in the case, maintaining that the appointments had been lawfully made. Nevertheless, the Senate persisted in its course. It confirmed two of the nominees, but rejected the third. The Supreme Court subsequently held the rejection invalid (United States *v.* Smith, 286 U. S. 6, 1932).

[2] See p. 193.

dent's hands in his endeavor to find capable men for high public positions. Time and again, even in recent years, men whom the President has invited to accept appointments have told him that they would not risk the humiliation of being rejected by the Senate. Most Presidents would have done as well, or better, without the restriction. A few, perhaps, would have done worse. The chief objection to the plan is that a President occasionally finds himself forced to smother his conscience in the case of some appointments in order to get others through. Moreover, the custom of senatorial courtesy, to which allusion has already been made, has virtually transferred to individual senators an influential share in the choosing of federal officers in their respective states.

HAS THE CONFIRMING POWER BEEN WISELY USED?

But not all the blame for the unsatisfactory workings of the confirmation arrangement can be laid at the Senate's door. Presidents have sometimes tried to circumvent the constitutional requirement by making recess appointments and then renewing such appointments after the Senate has rejected them. The rules with respect to these recess appointments have already been explained (p. 191) and they are reasonable enough. But Presidents have not always been minded to observe them in spirit. Occasionally they intentionally leave posts vacant until after the Senate has adjourned in order that appointees, whom the Senate would not have confirmed, may be put into office.

RECESS APPOINTMENTS.

TREATIES

The second executive power shared by the Senate is that of approving treaties. In dealing with this matter, the framers of the Constitution found themselves on the horns of a dilemma. If they gave the President sole power to make treaties, they would endow him with an absolute control over foreign affairs, including the power to enter into secret military alliances. They were not prepared to concentrate such far-reaching authority in the hands of any one man. On the other hand, they realized that "perfect secrecy and immediate despatch" are sometimes needed in the making of treaties.[1] And these essentials, it was easy to see, would be impossible if the President were forced to submit his negotiations, step by step, to a body of men representing all the states in the Union. In the end, a compromise was worked out by giving the President the power "with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur." Thus, two separate powers with respect to treaties were estab-

2. THE APPROVAL OF TREATIES.

[1] *The Federalist*, No. 64.

lished: the President being given the right to initiate and conduct the negotiations, while the ultimate fate of these negotiations was made dependent upon the willingness of the Senate to approve them by a two-thirds vote. At any rate, the language of the Constitution has been so interpreted.

REASONS FOR THE TWO-THIRDS REQUIREMENT.

The two-thirds requirement was adopted because a somewhat similar provision had existed in the Articles of Confederation and because the framers of the Constitution thought of the Senate as a small body — a council, not a legislature. Inasmuch as the Constitution was to go into force if nine states ratified it, there would be eighteen senators as a minimum. Ten would then suffice to make a quorum. With traveling conditions as they were in those days, it was anticipated that on some occasions hardly more than a quorum would be present. That had been the experience in the congress of the confederation. It would be questionable prudence to allow a very few senators, along with the President, to commit the country to a treaty of alliance: hence, the two-thirds precaution. The framers of the Constitution did not envisage the possibility that some day it would take more than sixty senators to get a treaty confirmed under the two-thirds rule.

HOW THE PRESIDENT AND THE SENATORS SHARE THIS POWER.

In treaty negotiations, as in the selection of persons for appointment to office, the Senate's advice is not asked in any formal way. Nevertheless, a wise President will not go ahead and conclude the terms of an important treaty without feeling out his ground. He will keep in touch with the leaders of the Senate, especially with the chairman of its committee on foreign relations, and ascertain in advance what the action of the Senate is likely to be. If he does not do this, he runs the risk of having the Senate reject his work, as it did with the peace treaty which President Woodrow Wilson submitted to it in 1919. It was no doubt with this example in mind that President Roosevelt appointed two members of the Senate foreign relations committee as delegates to the international conference at San Francisco, which in the spring of 1945 undertook the preliminary drafting of a world peace charter.

It has sometimes been remarked that a treaty goes into the Senate with the numerical chances two to one against it. In most cases its chances are not even as good as that, for the Senate has all sorts of suspicions about treaties and looks for loopholes in them. It behooves the President, therefore, to take the Senate leader frankly into his confidence at an early stage; otherwise he is likely to find a stillborn treaty on his hands. Several Presidents have had to learn this lesson. President Wilson was by no means the first among them, for the Senate had already rejected

important treaties submitted to it by Presidents Pierce, Grant, Cleveland, Taft, and Theodore Roosevelt.

SENATE PROCEDURE IN DEALING WITH TREATIES.

Treaties do not come to the Senate for formal action until all their provisions have been put in final shape. Then the document is referred to the Senate's committee on foreign relations, which may hold hearings and listen to objections from any source. When its deliberations have been concluded, the committee recommends that the treaty be approved, rejected, or approved with reservations. Before accepting this recommendation, the senators usually insist on going over the treaty, item by item, in committee of the whole. They may consume many days in doing this. The discussion usually (but not always) takes place in open session, with the galleries filled.[1] Until 1929 the rules required that treaties be considered in closed session unless the Senate voted otherwise; but in that year the old rule was abandoned. Now the debates are open unless a majority of the senators vote otherwise. Such procedure gives opportunity for obstruction and delay, while making secrecy quite impossible. If approval is finally given, the treaty is put into force by an exchange of ratifications with the other country; but if the Senate's approval is refused, its action is final and the labors of the treaty-makers have been in vain.

RESERVATIONS.

What happens if the Senate amends a treaty, in other words, if it approves the treaty with various "reservations" attached? The Supreme Court has ruled that the Senate, by reason of its constitutional power to give the President its advice as well as its consent, has the right to qualify its approval with reservations or modifications.[2] When the Senate attaches such reservations, the treaty does not necessarily die. The President, reopening negotiations if he so desires, may persuade the other signatory to accept the amended form. The outcome will depend mainly upon the nature and scope of the reservations.

REQUESTING THE PRESIDENT TO NEGOTIATE A TREATY.

The Senate may, either alone or jointly with the House of Representatives, request the President to negotiate with a foreign power on any matter. It has occasionally done so; but the President is under no legal obligation to comply. The initiative in treaty-making lies exclusively within his discretion. On the other hand, the President may recall a treaty from the Senate after he has submitted it and may decline to ex-

[1] The Senate may decide, by majority vote, that a treaty shall be considered in closed executive session; but even then any senator may make public how he voted.

[2] Haver *v.* Yaker, 9 Wallace, 32 (1870).

change the final ratifications with the other country, even after the Senate has voted approval. This, of course, he would not do unless conditions had changed in the interval.

LEGAL STATUS OF A TREATY.

A treaty, when duly approved and ratified, becomes the law of the land, and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. No state may make a treaty or enforce any law which contravenes a treaty made by the national government. The national government, on the other hand, may conclude treaties covering matters on which Congress would have no power to pass laws. The right of foreign citizens to acquire and hold property in the United States, for example, is a proper subject of a treaty provision, although the regulation of landholding in any state does not come within the legislative jurisdiction of Congress. For example, Congress cannot, by passing a law, give aliens the right to own land in any single state. But the President and the Senate, by making a treaty with a foreign country, could presumably grant this privilege to its citizens in all the states.

RELATION OF THE HOUSE TO TREATIES.

Strictly speaking, the House of Representatives has nothing to do with treaties, but occasions may arise in which action on its part is virtually necessary to make a treaty effective. No money can be appropriated for any purpose, no laws passed, no changes made in the tariff, without action on the part of the House. Treaties sometimes provide that money will be paid, or that reciprocity in tariff matters will be granted by the United States. The treaty with Russia, whereby the United States purchased Alaska in 1867, is an example; likewise the treaty with Spain in 1898, which provided for the payment of twenty million dollars in connection with the transfer of the Philippine Islands.

AN OPPORTUNITY FOR FRICTION.

But what if the House of Representatives had refused to join in appropriating the money stipulated by the terms of these treaties? That is a very old constitutional question, for it was raised and discussed in connection with the Louisiana Purchase of 1803, and it has been debated several times since; but it is still an unanswered question because the House has, thus far, never failed to do its part. To be sure, it has occasionally asserted its right to refuse, but it has always voted the money. Legal opinion inclines to the view that, while the refusal of the House to implement a treaty might place the nation in an awkward predicament, the House would be quite within its constitutional rights if it should take that stand.

It is sometimes said that treaty-making arrangements such as exist in the United States would be intolerable in any European land. In

England treaties are made by the secretary of state for foreign affairs without the necessity of submitting them to anybody outside the cabinet. In various countries of Continental Europe certain treaties have required legislative approval, but not the ones which require secrecy. Military alliances and other far-reaching international agreements have often been made by European chief executives alone. The people, through their direct representatives, have rarely been asked for advice; in some cases they have not even been informed of military alliances already made. Bismarck, the iron chancellor of the German Empire, once spoke of public opinion as "the great enemy of efficient diplomacy." It was an absurdity, he thought, to let the general public know and interfere with the game that was being played by experts on the diplomatic chessboard. If that is true, American diplomacy can never be very efficient, for more than a hundred persons have a share in it — the President, his cabinet, and ninety-six senators. It might seem as though so many cooks would be sure to spoil the broth, but the situation at least requires American diplomacy to be aboveboard and permits it to be honest.

THE TREATY-MAKING POWER AND SECRET DIPLOMACY.

Secret diplomacy is not yet a thing of the past in Europe, despite the fact that members of the League of Nations, during its twenty-years' existence, were required to register their treaties; but it ought to be, for there is little to be said in defense of it. The men of 1787 were wiser than they knew when, without having that purpose in mind, they set up a barrier against final validation of secret treaties of any kind, so far as America is concerned.[1] At times, no doubt, the requirement that treaties must go before the Senate has been a handicap. It has occasionally prevented the President from making a good bargain. It has compelled him to enter negotiations with one hand tied behind his back. Secretaries of state have fumed and fussed about the Senate's interference. Thus John Hay, secretary of state in the McKinley administration, groaned bitterly that a treaty entering the Senate was like a bull going into the arena: no one could say just how or where the final blow would fall; but one thing was certain — it would never leave the arena alive.[2] But in making this complaint, Hay pressed his point too far. He was thinking of a few notable treaties — notable because of the public interest taken in them. Less than fifteen per cent of all our treaties have failed because the Senate did not act upon them or rejected or mutilated them. The

VALUE OF THE AMERICAN SAFEGUARD.

[1] The Fathers did, however, recognize that the negotiations leading to a treaty should be conducted in secret, as the debates of the convention frequently show; they even thought that the Senate, because of its small size, would not betray confidential information.

[2] W. R. Thayer, *The Life and Letters of John Hay* (2 vols., Boston, 1925), Vol. II, p. 393.

necessity of senatorial concurrence has been on the whole salutary. It has held impulsive Presidents in bounds. It has kept the nation on its course without entangling alliances. Since the Constitution went into force, the United States has never concluded a single "secret treaty" of any sort.[1] No other great country can say the same.

SHOULD THE TWO-THIRDS PROVISION BE MODIFIED?

Nevertheless, it may be questioned whether the requirement of a two-thirds vote in the Senate has not outlived its usefulness. Would it not be better to substitute a requirement that treaties be ratified *by a majority vote in both Houses?* This would seem to provide an adequate safeguard, and it would have logic on its side, for a treaty has the force of a federal statute so far as the application of its provisions by the courts is concerned. Treaties and federal statutes are on the same plane of authority. One may repeal the other. Both, when constitutional, are equally the supreme law of the land. When a treaty and a statute are inconsistent, which supersedes the other? The one which is later in point of time prevails. Moreover, as has just been pointed out, there are some cases in which the provisions of a treaty cannot be carried into operation without action on the part of both Houses.[2]

IMPEACHMENTS

3. THE POWER TO TRY IMPEACHMENTS.

The Senate, as the Constitution declares, has "the sole power to try all impeachments." Several important questions arise with respect to the nature and scope of this impeachment power. How did this process of impeachment originate? Why did the framers of the Constitution establish it in the United States? Who may be impeached, for what offenses, and what are the penalties in the event of conviction? Does the procedure in impeachments differ from that of an ordinary trial by jury? Can a pardon be granted after conviction? And to what extent has the impeaching power been used in the national government of this country?

ITS ORIGIN IN ENGLAND.

Impeachment is of English origin. It dates back into mediaeval times; and for several centuries, before the development of cabinet responsibility, it afforded the only means whereby an adviser of the crown could be brought to account by the House of Commons. The Commons preferred the charges; the House of Lords heard the evidence and gave its decision. Many high executive

[1] But it has come rather close to it at times. Attached to the Lansing-Ishii Agreement of 1917 between the United States and Japan was a secret protocol which, except for one clause, has never been published. As to subject-matter, there was nothing to distinguish this agreement from a treaty; yet because called an agreement, it escaped submission to the Senate.

[2] See p. 293.

officials who used their power oppressively were brought up with a sharp turn in this way. An impeachment, however, should be clearly distinguished from a "bill of attainder," which provided a way of condemning men to death by ordinary legislative process, without formulating definite charges or giving them any sort of trial. Bills of attainder are prohibited by the Constitution of the United States, and they have long since become obsolete in England.

The English impeachment procedure, on the other hand, commended itself to the pioneers of the American political system as a necessary safeguard against the exercise of arbitrary power. They found difficulty, however, in determining just how the English impeachment system could best be adapted to the needs of a purely representative government. According to Alexander Hamilton —

WHY ADOPTED IN AMERICA.

> A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. . . . In such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.[1]

For this reason it was suggested that the impeachment power should be given to the Supreme Court, or to the Supreme Court and the Senate sitting together. But there were practical objections to both these alternatives. Would it be wise, for example, to have an impeachment of the President tried by judges whom he himself had appointed? So the convention decided to follow the traditional English practice of allowing the lower House to prefer the charges and the upper House to hear them. Its members were well aware that this was by no means an ideal arrangement. But if mankind, as one of the delegates sagaciously remarked, "were to agree upon no institution of government until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert."

Who may be impeached? "The President, Vice-President, and all civil officers of the United States," says the Constitution. The list of civil

[1] *The Federalist*, No. 65.

officers obviously includes, in its higher ranges,[1] such public servants as diplomats, members of the cabinet, and judges of the federal courts. Does it include senators and representatives in Congress? Before preferring charges against Senator Blount in 1797, the House decided, after thorough debate, that he was an impeachable officer. The attitude of the Senate, on the other hand, was ambiguous. After ordering his arrest and preparing for the trial, it expelled Blount by an almost unanimous vote, then declared him exempt from impeachment, and finally (by a majority of three) dismissed the charges for want of jurisdiction. So this precedent is of doubtful value. Does it mean more than this: that a senator who has been expelled from his seat is not impeachable after such expulsion? Does it imply that a member of Congress is not a civil officer of the United States; that, if this is so, he must be an officer of one of the states; and that, on either assumption, he is not liable to federal impeachment?

LIABILITY TO IMPEACHMENT.

Perhaps the question is academic. The Blount case has sometimes been distorted into a clear precedent of immunity which either House can defend successfully, because, with this one exception, no attempt to impeach a member of Congress has ever been made. Certain points, however, deserve a word of emphasis. In the first place, senators and representatives are not state officers. In two election contests waged before the Senate, the authorities that were cited — legislative and judicial, federal and state — seem to be conclusive on this point.[2] Second, they may not be "civil officers of the United States." Two provisions of the Constitution support this view. One bars them from appointment to any civil office under the authority of the United States during the period for which they were elected; the other bars them, and any person holding office under the United States, from serving as presidential elector.[3] The phraseology suggests that appointment, as against election, is the essential mark of "civil office" or even "office." In more recent times both the President and members of Congress appear as elective federal officers, though not as "civil" officers, in statutes and judicial decisions.[4] And third, whatever difficulties the phrasing of the Constitution may raise, there is evidence that the Fathers,

DOES IT INCLUDE MEMBERS OF CONGRESS?

[1] Impeachment has never been considered appropriate to the lower ranges. Removal by the President and prosecution in the courts afford an adequate remedy for the misconduct of a postmaster or a collector of internal revenue.

[2] Cited by Senator Walsh in the case of Frank P. Glass (1913) and by Senator Goff in the case of Gerald P. Nye (1925–1926).

[3] Constitution, Article I, Section 6, and Article II, Section 1.

[4] In the case of *ex parte* Yarbrough (110 U. S. 651, 1884), the court was puzzled over terminology. "The office (of congressman), if it be properly called an office, is created by the Constitution and by that alone."

and some of their eminent associates, took for granted the liability of legislators to impeachment. The opinions which they expressed in *The Federalist* and in the ratifying conventions should prevail over any biased reading of the Senate's resolutions in the Blount case.[1]

IS RESIGNATION A BAR?

May a civil officer of the United States be impeached for an offense committed while holding office, even though he is no longer in office when the impeachment proceedings begin? That was one of the points raised in the Belknap Case (1876). Belknap was secretary of war during Grant's second administration. He was charged with having received money from the profits of trade at one of the Indian posts under his jurisdiction. When the charge was made public, impeachment proceedings were begun in the House; and Belknap tried to sidestep them by resigning. President Grant accepted the resignation, but the Senate voted by a majority (37–29) to proceed with the impeachment, which it did. For lack of the requisite two-thirds majority, however, Belknap was not convicted. So the question cannot be looked upon as having been decisively settled.[2]

FOR WHAT OFFENSES?

The Constitution sets forth the offenses for which a civil officer may be impeached; but it does not do this with absolute clearness. The grounds for impeachment, as therein stated, are "treason, bribery, or other high crimes and misdemeanors." The first two words of this clause are definite enough, but the remaining part of it is ambiguous, and this ambiguity has given rise to some difference of opinion, for a misdemeanor in the eyes of the law is a relatively trivial offense. It is now commonly understood, however, that civil officials are not to be impeached except for grave misconduct, dishonesty, or malfeasance in office. General incompetence, or bad judgment, or the unwise use of discretion are not grounds for impeachment.[3]

THE PENALTIES.

When a public official is convicted by the Senate, he cannot be punished to any further extent than by removal from office and disqualification from holding a civil office ever again under the national government. He cannot be put to death, imprisoned, or fined. But conviction upon impeachment does not prevent additional proceedings against a civil officer in the ordinary courts of the land if he has committed an indictable offense. A two-thirds

[1] In *The Federalist*, Hamilton (No. 66) and Jay (No. 64); in ratifying conventions, Randolph, Mason, C. C. Pinckney, Patrick Henry, and others.

[2] For an argument that such officers are not liable to impeachment, see Joseph Story, *Commentaries on the Constitution of the United States* (5th edition, 2 vols., Boston, 1891), Sec. 801.

[3] Yet District Judge English (1926) was charged with partiality and favoritism. In the case of President Johnson, the tenth article charged him with bringing his high office into contempt by speeches denunciatory of Congress. In ten of the twelve cases of impeachment the charges included other than indictable offenses.

vote of the Senate is necessary in all cases for conviction on impeachment; and no pardon from any human source is possible in the case of one so convicted. The Constitution makes this single exception to the President's pardoning power — for the obvious reason that it would not do much good to impeach a presidential adviser if the President retained his prerogative of pardon in such cases.

THE PROCEDURE.

The procedure in impeachments may be briefly outlined. First, the accusation is made by some member of the House of Representatives from the floor of that body. A committee of the House is then appointed to investigate the charges. If it finds that an impeachment should be proceeded with, the committee so reports to the House; and the latter may vote to accept this recommendation. In this case, articles of impeachment are prepared and transmitted to the Senate. The Senate has no discretion as to whether it will accept these articles or not. It merely sets a date for the trial and furnishes the accused official with a copy of the charges preferred against him. In hearing an impeachment, the Senate sits as a court, the senators being "placed on oath or affirmation" before the proceedings begin.

WHO PRESIDES?

The Vice-President of the United States presides over the Senate, except when the impeachment is directed against the President, in which case the Chief Justice of the United States presides. This provision is made for a self-evident reason: namely, that the Vice-President would not be an appropriate chairman, since the outcome of the trial might determine his own promotion to the presidency. In impeachments the usual rules of evidence are observed; the accused official is allowed to be heard in his own defense; he may summon witnesses and may have his own counsel. The proceedings are public until the senators are ready to vote upon a verdict. While deliberating upon its decision, the Senate may direct the doors to be closed.[1]

FAMOUS IMPEACHMENTS.

There have been twelve federal impeachments in all, five of them within the last forty years. The most notable were those of William Blount, senator from Tennessee (1797–1799); Andrew Johnson, President of the United States (1868); and William Belknap, secretary of war (1876), none of whom was convicted.[2] Senator Blount was charged with having taken part in a conspiracy to stir up trouble in Florida and Louisiana, which at that time belonged to Spain. The Senate

BLOUNT.

[1] See "Rules of Procedure and Practice in . . . Impeachment Trials," in the current edition of the *Senate Manual* (Government Printing Office, Washington).

[2] The first conviction (1804) was that of John Pickering, a federal district judge, who was charged with "drunkenness and profanity on the bench." He was probably insane. The second (1862) was that of another district judge, West H. Humphreys, who was charged

expelled him from its membership, but refused to convict him for reasons which have been already explained. Secretary Belknap, as has already been said, was charged with corruption: namely, the acceptance of money from a trader whom he had appointed to an Indian post. The Senate, after hearing all the evidence, failed to reach a verdict of conviction.

BELKNAP.

Finally, most conspicuous of all, there was the Johnson case. Andrew Johnson of Tennessee was not elected President. He succeeded to the office on Lincoln's death and found a hostile Congress in readiness for him. More particularly, he disagreed with the radical Republicans over the procedure to be followed in reconstructing the southern states. The two ends of Pennsylvania Avenue began hurling brickbats at each other. The charges against President Johnson were eleven in all, most of them having to do with "discourtesy to Congress" and with violations of the Tenure of Office Act, which Congress had passed over the President's veto in 1867. This act forbade the dismissal of certain public officers without the Senate's approval. It was clearly an unconstitutional statute and was later repealed. President Johnson was justified in refusing to be controlled by its provisions, but he was not politically discreet in permitting himself to be drawn into a knockdown fight with Congress when he might have avoided it by a reasonable admixture of conciliation and adroitness.

JOHNSON.

So Congress made up its mind to get rid of the President. His trial was conducted in an atmosphere of intense bitterness. While it dragged on, the whole country ranged itself into two camps. At its conclusion the Senate voted thirty-five to nineteen for conviction, which was only one vote short of the required two thirds. It was a close call. At the ensuing presidential election, a few months later, Johnson was not a candidate; and the incoming of President Grant ended the strained relations which had existed between the executive and legislative branches of the government.

HIS ACQUITTAL.

An impeachment is, at best, a cumbrous and costly proceeding. It is not a method to be used if there is any simpler way of securing an officer's dismissal. But in the case of the President, or of federal judges who hold their offices during good behavior, or of cabinet members whom the President may decline to dis-

A LAST RESORT.

with having "engaged in rebellion against the United States," as he had thrown in his lot with the Confederacy without resigning his judgeship. The third (1913) was that of Judge Robert W. Archbald of the short-lived Commerce Court, charged with having accepted "presents" from persons who had cases before him. The fourth (1936) was that of Halsted L. Ritter, district judge, charged with various improprieties which were alleged to have brought his court into disrepute.

miss, it may be the only way of forcing anyone out of office immediately.[1] Threats of impeachment are made from time to time when members of the cabinet or other high officials become unpopular with congressmen, but most of these are mere political vaporings. Impeachment is a procedure that should never be utilized except as a last resort. The British parliament has not used it since 1805.

THE SENATE'S SHARE IN LAWMAKING

In addition to its three special prerogatives as above enumerated, the Senate has a general power which is more important than all of these combined. It is not only an advisory council and a court of impeachment, but a legislative body as well. It is a co-ordinate, not a subordinate, branch of the American Congress and divides with the House of Representatives the function of making the national laws. Aside from one relatively unimportant exception, its legislative authority is exactly co-equal with that of the House. This exception relates to measures for raising revenue, all of which, by the terms of the Constitution, must "originate" in the House of Representatives. However, the Senate "may propose or concur with amendments as on other bills."

A CO-EQUAL BRANCH OF CONGRESS.

This bestowing of an exclusive privilege upon the House in the matter of revenue bills was suggested by an old parliamentary rule in England. The larger states demanded in 1787 that it be made a constitutional rule in the United States. Otherwise, they feared, the smaller states, through their control in the Senate, would promote measures of taxation placing most of the burdens on the larger commonwealths. But, in practice, the limitation on the Senate's right to "originate" revenue bills has proved to be of very little importance, for the Senate can virtually initiate new revenue proposals under the guise of amendments.[2] Some years ago, for example, the House originated and sent to the Senate a tariff bill — and a tariff bill is a revenue measure, if anything is. On receiving it, the Senate struck out everything in the bill except the enacting clause.[3] Then it inserted a new tariff of its own and transmitted the measure back to the House "as amended." The House grumbled for a while over this evasion of its own

THE SENATE AND REVENUE BILLS.

[1] With respect to the lower federal courts, the judiciary committee of the House proposed in 1937 an alternative method, trial by three judges of the circuit court of appeals, these three judges to be selected by the Supreme Court. This proposal failed of adoption, but a similar one passed the House in 1941.

[2] By a "revenue bill" is meant a measure primarily designed to raise revenue, not one which aims principally at some other purpose and incidentally brings in revenue.

[3] This is the introductory clause which stands at the head of every measure: "Be it enacted by the Senate and House of Representatives of the United States in Congress assembled:"

special privilege, but, in the end, accepted the tariff which the Senate had virtually originated. On another occasion when a tariff measure, originated and passed in the House, came back from the Senate, there were no fewer than 847 amendments clinging to it.[1] So the Senate has originated revenue measures in fact, if not in form. It has found a way of doing what the Constitution did not intend it to do.

APPROPRIATION BILLS.

On the other hand, the Constitution gives the House no exclusive power to originate expenditure bills, or appropriation bills, as they are called. No constitutional prohibition prevents the Senate from originating appropriation bills, including even a national budget, if it chooses to do so. But the House at an early date assumed the exclusive right to originate such bills, and this power it guards with great jealousy. The Senate occasionally ventures to originate a measure which incidentally carries an appropriation of money for a single purpose; but the annual budget, and all general appropriation measures, are first submitted in the House.

LEGISLATIVE POWERS OF THE SENATE AND THE HOUSE ARE SUBSTANTIALLY CO-ORDINATE.

In all other matters the powers of the two chambers, both by the Constitution and by usage, are equal in scope. No bill can become a law without the Senate's approval. At various times and on various matters, one chamber or the other may have the greater amount of legislative influence because of its better organization or stronger hold upon public opinion. It is sometimes asserted that the Senate, taking its legislative history as a whole, has originated more important legislation than the House, and this statement is probably true. Nor is it surprising, for the senators are, for the most part, more experienced in lawmaking than are their colleagues of the lower House.

SENATE INVESTIGATIONS.

Attention should be drawn to a legislative function which the Senate has developed to rather large proportions in recent years: namely, that of undertaking special investigations into matters of all sorts. This is called a legislative function of the Senate because, in theory, the various investigations are undertaken to secure data that will be of service to the Senate in the framing of future legislation. If it is urged that a law be passed to crush the evils of stock-market speculation, for example, the senators desire to discover at first hand what these evils are and why they exist. So they appoint a committee to make an investigation. In a strict sense, the Senate has no right to conduct any investigation except insofar as it may seem necessary to determine whether some new legislation is desirable, and, if so, what legislation. This, however, affords ample basis for any investigation that

[1] Henry Cabot Lodge, *The Senate of the United States* (New York, 1921), p. 9.

the senators wish to start, and they have started a good many during the last dozen years.

HOW CONDUCTED.

The usual plan is to pass a resolution ordering an investigation of oil leases on government lands, or telephone companies, or holding corporations, or the expenditure of money in elections, or some other matter that seems to call for remedial legislation. The resolution also designates a committee of senators to conduct the inquiry.[1] The committee may sit in Washington, or it may go about the country hearing testimony, "on a fishing trip," as it is called. Such committees have power to summon witnesses, compel the production of papers, take evidence under oath, and in general to exercise the probing authority of a court. To say that they are merely seeking data as a basis for legislation is to use the words with Pickwickian versatility. What they are often seeking is ammunition that can be used in the next election campaign. The power of investigation, when used by a legislative committee in this way, is susceptible of serious oppression and abuse.

DISAGREEMENTS BETWEEN THE TWO CHAMBERS — HOW SETTLED.

If the Senate and the House fail to agree on any measure, one or the other must give way, or a compromise must be arranged by both giving way in part. This is effected by means of a conference committee — actually a bifurcated body on which the group from each House votes as a unit and varies in size from three to eleven.[2] In these compromises the Senate has a reputation for getting the better of the bargain. And this is not surprising, for the Senate is usually represented on conference committees by stronger personalities, by men of greater skill in bargaining. As a rule, moreover, the Senate gives its conferees a firmer degree of support. Something depends, of course, upon the reaction which comes from the country while the measure is in conference. This may be strongly in favor of the House attitude, in which case the senators, with their ears to the ground, are likely to recede. Or it may be such as to stiffen them in their attitude.

THE SENATORIAL PRIDE.

The older senators, who guide the upper chamber in its work, are men who have usually acquired a nation-wide reputation. Naturally they are inclined to regard themselves as the senior lawmakers of the land, and to look upon most members of the lower House as neophytes who have a good deal to learn. Even upon the President, as Woodrow Wilson once remarked, the

[1] On this general question, see E. J. Eberling, *Congressional Investigations* (New York, 1928), M. E. Dimock, *Congressional Investigating Committees* (Baltimore, 1929), and George H. Haynes, *The Senate of the United States: Its History and Practice* (new edition, 2 vols., Boston, 1938), Chapter xv.

[2] For a further discussion of conference committees see p. 333.

veteran members of the Senate look with "unmistakable condescension." But if this is the case, it is not because the Constitution intended senators to have more prestige than members of the House, but rather because the Senate is a more compact body, better organized, with a longer term of membership, and perhaps less amenable to the fluctuations of public opinion. "Obedient to the law of political gravitation," as one writer has remarked, "it draws new particles of power whenever opportunity affords."

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CHAPTER XIX

THE HOUSE OF REPRESENTATIVES: ITS ORGANIZATION

The republican form of government is the highest form of government; but because of this it requires the highest type of human nature, a type nowhere at present existing. — *Herbert Spencer.*

The House of Representatives was intended to be a reformed and popularized House of Commons: in other words, to serve as the direct reflector of popular opinion in the nation's government. At the outset it was the only branch of the national government that drew its mandate directly from the people, hence the House of Representatives became designated as the "popular branch" of Congress. But this difference has long since been swept away. The senators are now chosen quite as directly, although not at such frequent intervals, as are the members of the House.

THE "POPULAR BRANCH" OF GOVERNMENT.

The framers of the Constitution took for granted that any body of directly elected representatives would be too easily swayed by public emotion. Reason would not always be its guide. It would be temperamental in a large sense. Consequently these founders of the national government were inclined to be distrustful of what one of them called a "House of Demagogues." On the other hand, the establishment of a popular chamber in the new national legislature was regarded by everyone as an absolute necessity of practical politics.[1] To create a federal government with no branch of it directly responsible to the voters was out of the question. In all the colonies popular assemblies had grown up, and all the states in 1787 had provided for at least one such body in their new legislatures. A Constitution without provision for one directly elected chamber would never have had a chance of being ratified. In view of the bitter protests which had been raised against taxation without representation in Revolutionary days,

THE EARLY DISTRUST OF IT.

[1] James Madison and James Wilson, the most persuasive pair of delegates in the convention, argued that despite the dangers involved in popular representation no plan of free government could hope to endure unless one branch of the legislature was made directly accountable to the people, that is, to the limited electorate of that time.

moreover, the claim of the people to direct control over the "taxing power" was one which could not be denied.

THE BASIS OF REPRESENTATION IN THE HOUSE.

The Constitution, accordingly, provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several states." In accordance with a compromise which had been agreed upon, it was further stipulated: first, that the several states should be represented according to their respective populations; and, second, that in estimating this population, all persons other than free white persons were to be counted on a three-fifths basis, in other words, that negro slaves were to be counted at only 60 per cent of their numerical strength. The first House of Representatives was to have sixty-five members, distributed among the states in a way which was assumed to be roughly proportional, but a census was to be taken forthwith, and a redistribution on a more accurate basis arranged on the official figures. Further provision was made that a similar redistricting should take place after each decennial census, but with the limitation that the House should never contain more than one member for every thirty thousand population. Every state, however small its population, must nevertheless be given at least one representative. Within these limits the size of the House is left to the discretion of Congress itself.

WHO VOTE AT CONGRESSIONAL ELECTIONS?

As to who should have the right to vote at congressional elections, the framers of the Constitution did not venture to decide. There were, at the time, wide differences among the states in the matter of suffrage requirements, and it was not deemed advisable to impose upon any of them a provision which might be out of accord with their own practice and thus establish two different electorates within the same state. So the members of the constitutional convention, being resourceful politicians, neatly evaded the difficulty by passing the problem to the states, each one to decide for itself. This was hardly a logical thing to do, for the suffrage is a fundamental factor in government and ought not to differ from place to place in the same election; but logic gave way to practicalities in this as in many other provisions of the national Constitution.

EACH STATE DECIDES FOR ITSELF.

Each state, accordingly, is given the right to determine who shall vote at congressional elections, but subject to the restriction that the requirements must be the same as those for voting at elections to "the most numerous branch" of its own legislature. Whoever has the right to vote for members of the state assembly must therefore be given the right to vote for members of the national

House of Representatives.[1] Strictly speaking, there is no *national* suffrage in the United States, as in other countries. Federal officers do not register the voters in any state, or provide the polling places, or print the ballots, or count them. State and local officials do it all. Representatives in Congress are chosen by election machinery which the states provide, pay for, and supervise. The fifteenth and nineteenth amendments to the federal Constitution do not, in a literal sense, confer the suffrage on anybody; they merely provide that it must not be denied on certain grounds.

OTHER MATTERS RELATING TO CONGRESS ON WHICH THE CONSTITUTION IS SILENT.

The framers of the Constitution not only evaded the problem of a uniform suffrage, but they sidestepped several other questions relating to the organization of the House. They did not decide whether the election in each state should be by congressional districts or by the voters of the state at large. They did not even stipulate that elections should be by ballot, much less by secret ballot, or that they should be held in all the states on the same day. They merely left the "time, place, and manner of holding elections" to be decided by the individual states, each in its own way; but gave the national government a trump card to play, if ever need should arise, by providing that "Congress may at any time make or alter such regulations, except as to the places of choosing senators."[2]

GROWTH OF THE HOUSE IN SIZE.

The first House of Representatives, which met in 1789, contained sixty-five members — which was one representative for every 30,000 people. When the Constitution came before the states for ratification, there was some complaint that this quota of representation had been set too high. It seemed absurd to those critics that any congressman should expect to represent as many as 30,000 people. With the then-existing facilities for getting around and making acquaintances, he could hardly hope to reach half that number. Today the quota of representation is more than ten times as large; the average congressman represents more than 350,000 people. At any rate, the House soon began to grow like Jonah's gourd. Within thirty years it more than trebled in size. Although this rapidity of growth did not continue, the membership increased after every census, except that of 1840, during more than one hundred years. By 1911 it had reached 435. There

[1] See p. 99.

[2] Article II, Section 4. The reason for the exception in the last clause is that the senators were to be chosen by the state legislatures at the state capitals, and it was not deemed wise that Congress should have power to compel the legislatures to meet for this purpose at some other place.

has been no enlargement since that time because of the general belief that the House had grown too large for the efficient handling of business. Indeed, a statute of 1929 (which can, of course, be repealed) fixed the size of the House permanently at that figure.

THE APPORTIONMENT OF SEATS.

How are these seats apportioned among the states? The Constitution provides that they shall be distributed among the states upon the basis of their respective populations as shown by the last decennial census.[1] Every ten years, therefore, it is the duty of Congress to make a reapportionment of seats. The methods of doing this have varied. In the first half of the nineteenth century, the representation of each state was determined by fixing a quota in advance, dividing the state population by it, and — except when a state was awarded the constitutional minimum of one seat — ignoring fractions.[2] In the latter half of the century, the process began by fixing the size of the House, which invariably meant increasing it.[3] Then, to obtain the quota, the population of the whole country was divided by the number of seats. At first glance this redistribution of seats appears to be an easy problem of simple arithmetic.

A PROBLEM IN ARITHMETIC.

For two reasons, however, the problem is not quite so easy as it looks. In the first place, the Constitution requires that every state shall have at least one representative, even though its population is less than the quota of representation.[4] Consequently, one member is assigned to each of the forty-eight states, and the remaining seats (387) are left to be assigned to the states in proportion to their respective populations. But here arises the second difficulty: when the population of any state is divided by the quota of representation there is always some population left over — almost enough, in some cases, to give an additional seat, and in others, not nearly enough. To put it in another way, the dividing of each state's population by the quota of representation leaves a major fraction in some cases and a minor fraction in others. What is to be done about these? The problem has been solved (as indicated in the footnote below) by a plan whereby the quota of representation is now fixed at such a figure that every state with more

[1] Although the original Constitution stipulated that persons other than "free white persons" should be counted on a three-fifths basis, this provision was eliminated by the fourteenth amendment.

[2] In 1842 an additional seat was assigned for a major fraction of the quota.

[3] On one occasion by 50 seats.

[4] There are now four states with only one representative — Delaware, Nevada, Vermont, and Wyoming, with populations ranging from 110,000 to 359,000; and nine states with only two representatives, New Hampshire, having the smallest population (491,000), and Rhode Island, the largest (713,000).

than half this quota gets an additional seat and there are exactly enough seats to go around.[1]

With its present membership of 435, the House is too large. Business is impeded by its bulk. There should be a reduction to 400 or less. But such a reduction, as a matter of practical politics, is difficult to bring about. No state likes to have its allotment of congressmen cut down. The congressmen from states which are likely to suffer can be counted upon to combine in opposition to any such proposal. The best that can be hoped for, then, is to keep the House from growing larger. Even at that some states lose seats after each decennial census,[2] for the rapidly growing regions of the country become entitled to more, which means that other sections must be content with less. After the census of 1920, it became evident that an increase in the size of the House could not be avoided except by reducing the representation from several states. These states put up a stiff fight and succeeded in preventing any reapportionment at all, thus forcing Congress into the evasion of an express constitutional mandate. In connection with the census of 1930, a continuing reapportionment law was passed. It provides that the size of the House shall be permanently fixed at 435 members and directs the census bureau to furnish Congress with tentative apportionments based on alternative methods. Then, if Congress fails to select one of these alternatives, the method last used (ten years earlier) shall be applied. This is intended to prevent a repetition of what happened after the census of 1920: namely, the failure of Congress to take any action whatever.

WHY THE SIZE OF THE HOUSE IS HARD TO REDUCE.

Congress allots representatives to states, not to districts. A state is given one, two, three, twenty-five, forty-two seats — whatever its allotment may turn out to be. Then the state legislature (when the state has more than one representative) makes

THE CONGRESSIONAL DISTRICTS.

[1] The *method of major fractions*, used after the censuses of 1910 and 1930, works out this way: the population of the several states is divided successively by $1\frac{1}{2}$, $2\frac{1}{2}$, $3\frac{1}{2}$, etc. These numbers, or quotients, are then set down in the form of a series, the highest number first; the next highest, second; the next highest, third; and so on, down to the lower numbers. One seat is first allotted to each of the forty-eight states. Then the state having the number which is first or highest on the list is allotted the forty-ninth congressman; the next highest is given the fiftieth; the next, the fifty-first; and so on, until the seats are exhausted. By using this method, each state receives one representative for each full quota and an additional one for a major fraction of the quota.

An alternative plan, known as the *method of equal proportions*, was used in the last apportionment. Its only difference is that the population of the several states is divided successively by $\sqrt{1 \times 2}$, $\sqrt{2 \times 3}$, $\sqrt{3 \times 4}$, and so on, instead of by $1\frac{1}{2}$, $2\frac{1}{2}$, $3\frac{1}{2}$, etc.

[2] Nine, after the census of 1940; twenty-one, after the census of 1930, this exceptionally large number being due to the fact that Congress failed to pass an apportionment act ten years earlier.

the division into congressional districts. The task is assigned in the first instance to a committee of its own members, appointed for this purpose, and the recommendations of this committee then come before the state legislature to be acted upon. So far as practicable, an effort is usually made to have the districts fairly equal in population and made up of contiguous territory.[1] Likewise, an effort is made to respect local boundaries by placing an entire city or town in one congressional district, but at times it becomes necessary to place one part of a municipality in one congressional district, while the remaining part is placed in another. In rural areas the aim is to put whole counties into the same district, wherever it is feasible to do so. To accomplish all these things, and yet have districts approximately equal in population, is sometimes a difficult problem. It demands careful study and absolute fairness.

Too often, unhappily, it receives neither. State legislatures are partisan bodies, and so are their committees. Because of their intense partisanship, the attempt is frequently made to lay out the districts in such way that the interests of the dominant political party will be served. This practice of "gerrymandering" is very old; it took its name from Governor Elbridge Gerry of Massachusetts, who sanctioned one of the first flagrant cases of partisan district-making in that state.[2] Thereby he set a fashion which persisted for many years, and has not yet entirely disappeared. By adding one town or county and taking off another, by shaping the district in some distorted way, so that its nearest resemblance may be to a starfish or a lizard, it is often possible to make the area yield a comfortable majority for the candidate of the right political party. The hostile voters, on the other hand, can be "hived," or massed, into a few districts which are likely to go to the opposition party anyhow.[3] In a word, the art of gerrymandering is to spread the majorities of your own party over as

THE PRACTICE OF "GERRYMANDERING."

[1] Because the apportionment act of 1929 omits such restrictions, the Supreme Court has decided that federal laws no longer require districts to be composed of compact and contiguous territory containing as nearly as practicable an equal number of inhabitants.

[2] Mr. John Fiske has given the following account of the incident: "In 1812, when Elbridge Gerry was governor of Massachusetts, the Republican legislature redistributed the districts in such wise that the shapes of the towns forming a single district in Essex County gave to the district a somewhat dragon-like contour. This was indicated upon a map of Massachusetts which Benjamin Russell, an ardent Federalist and editor of the '*Centinel*,' hung up over his desk in his office. The celebrated painter, Gilbert Stuart, coming into the office one day and observing the uncouth figure, added with his pencil a head, wings, and claws, and exclaimed 'That will do for a salamander!' 'Better say a Gerrymander!' growled the editor; and the outlandish name, thus duly coined, soon came into general currency."

[3] One district in Illinois was long known as the "saddlebag" congressional district because it comprised two groups of counties at opposite ends of the state with a thin strip connecting them. On the history of gerrymandering in general, see E. C. Griffith, *The Rise and Development of the Gerrymander* (Chicago, 1907).

many districts as possible and concentrate the strength of your opponents into as few districts as you can. The gerrymander has been a pernicious factor in American politics, and popular sentiment has been slowly developing against it. Today it often proves a boomerang to the party that attempts it.

Sometimes a state legislature does not complete its redistricting before a congressional election comes. In that case, one of two things will happen. If the representatives of the state have been increased, the old districts will choose one congressman each, while the additional congressmen will be chosen at large. But if the representation of the state has been reduced, all the remaining seats must be filled on a state-wide basis, the old districts being disregarded until the new ones can be established. This explains the reason for occasional references to a congressman at large.[1]

SURPLUS MEMBERS AT LARGE.

Candidates for election to the House are nominated as the laws of each state may provide. Two states still retain the plan of nomination by conventions of party delegates; the rest have now provided for direct primaries.[2] The change, it was thought, would bring forth candidates of a better type, but it has apparently resulted in no perceptible improvement. The quality of the House membership has not visibly changed since the voters took into their own hands the function of nominating candidates. As primary campaigns are expensive, a great advantage goes, under the direct primary system, to the candidate who commands an ample campaign fund.

NOMINATIONS.

Congressional elections are held throughout the country on the same day: namely, on the Tuesday following the first Monday of November in every alternate year.[3] The voting must be by secret ballot, but this does not preclude the use of voting machines. Candidates for other offices, state or national, are usually chosen at the same election and on the same ballot, the so-called Australian type of ballot being the one which is generally used. Almost all the states make provision for absent voting. By this arrangement those voters who are absent from their homes on election day are allowed to vote by mail or, in some cases, to mark their ballots before leaving home.[4]

ELECTIONS.

[1] In the Seventy-eighth Congress, elected in 1942, examples were furnished by Connecticut, Florida, Illinois, New York, Pennsylvania, and three of the nine states having only two representatives.

[2] For an explanation see Chapter XXXVIII.

[3] A few states which could not accommodate themselves to this arrangement without amending their state constitutions were exempted from the general rule. Maine still holds her congressional elections in September and thus attracts a good deal of attention as affording an indication of what is likely to happen in the rest of the country at the subsequent November balloting. Hence the saying, "As Maine goes, so goes the Union."

[4] See p. 110.

VOTERS IN THE ARMED FORCES.

Early in 1944 discussion arose over the need for federal legislation permitting members of the armed forces and auxiliary services stationed overseas to vote in the prospective general election. Much of the discussion hinged upon the question of whether or not Congress could authorize a *federal* ballot. In a compromise measure, it was provided that absent servicemen, and others engaged in war work overseas, might vote for President and congressmen on a federal "short" ballot, if the state where they normally voted had no absentee voting law or failed to transmit a state ballot on request, provided the governor of the state certified that state authorities could count the federal ballot. Many thousands of servicemen and others overseas voted under the provisions of this measure.

CONTESTED ELECTIONS AND RECOUNTS.

When any dispute arises in connection with the validity of an election, the House of Representatives is the deciding authority, having the sole power to judge "the elections, returns and qualifications of its own members." The procedure, in such cases, is for the defeated candidate to serve notice upon the one who has been reported as elected, setting forth the grounds of his protest. To this the latter makes a formal reply, and the papers are transmitted to the clerk of the House. The matter is thereupon referred to one of the committees on elections, of which the House maintains three, and this committee hears the evidence in the case. When this is concluded, the committee reports to the House, where its recommendation is usually accepted. Incidentally, it may be mentioned that disputed congressional elections are not common in the United States.[1] It is accounted good sportsmanship to accept the results of the balloting as announced when the polls are closed. When the successful candidate's lead is very small, however, a recount of the votes is sometimes asked for and granted under such conditions as the election laws provide.

QUALIFICATIONS OF REPRESENTATIVES.

The qualifications of a representative in Congress, as set forth in the Constitution, are merely that he shall be a citizen of seven years' standing, at least twenty-five years of age, an inhabitant of the state from which he is elected, and not a holder of any office under the authority of the United States. Even army and navy officers are regarded as coming within the scope of this prohibition as to officeholding. It will be observed that nothing is said about the candidate's being a resident of the *congressional district* from which he seeks election. It is legally permissible for a congressional

[1] On the average about half a dozen for each Congress. V. M. Barnett, Jr., "Contested Congressional Elections in Recent Years," *Political Science Quarterly*, Vol. LIV (1939), pp. 187–215.

district to elect a nonresident, and on some occasions this has happened; but there is a natural prejudice against the outsider, or "carpetbagger," who enters the field against "a local man," since the latter, presumably, "knows the needs of the district better." Local pride takes offense at the idea that a scarcity of home-grown material requires any district to go outside for a congressman.

This insistence on a local man, who will know the "needs of his district," is something that began in the days of the spoils system. It is closely related to the popular notion that all congressional districts, being created free and equal, should have their rightful quota of spoils and patronage. Every congressional district desires to participate in the annual appropriations for federal buildings, or for the improvement of rivers, harbors, and roads. It wants to acquire or to keep, a navy yard, aviation field, power project, training camp — any one or more of the many things which are in the discretion of the national government to give. Its aspirations along these lines can best be promoted, the voters believe, by a go-getter type of local man who is working for his own district first, last, and all the time.

WHY LOCAL CANDIDATES ARE FAVORED IN AMERICA.

This prompts a query as to the proper function of a representative, whether in Congress, in a state legislature, or in any other elective body. Is it his duty to act in accordance with his own conception of the general welfare, regardless of whether this may serve the interests of his own particular district? Or is it the sole function of a representative to "represent," in other words to discover what his district wants and to direct his energies accordingly? These are questions which every representative must face at times. A legislator may be personally opposed to compulsory military training in time of peace, let us say; but if a majority of the voters in his own district are known to be strongly in favor of such measures, how should he vote upon the question? Should he stultify his own convictions, or should he disregard the wishes of those who sent him to be their representative? Is it conscience or constituents that ought to determine his vote? Congressmen are often confronted by this dilemma. Students of political philosophy, too, have wrestled with it, but have reached no agreement of opinion.

THE LOGICAL FUNCTION OF A REPRESENTATIVE.

It may not be inappropriate to quote in this connection the dictum of Edmund Burke in his address to the voters of Bristol. He was defending certain unpopular votes which, as their representative, he had given in the House of Commons. "I maintained your interests against your opinions," he declared. "A repre-

THE DICTUM OF BURKE.

sentative worthy of you ought to be a person of stability. I am to look indeed to your opinions; but to such opinions as you and I must have five years hence. I am not to look to the flash of the day." The American legislator does not talk in that strain. His job, as he usually conceives it, is to find out what the people want him to do and do it quickly.[1] He keeps his ear close to the ground — so close, as someone has said, that he "gets it full of grasshoppers."

CONGRESSIONAL TERMS ARE TOO SHORT.

The brevity of the congressman's term is partly responsible for this. He is chosen for two years only. He does not have time to make a broad record by which he may be fairly judged. His home folks are likely to be guided, in their estimate of his work, by the way he votes in Congress on the few outstanding measures which happen to come up during his all-too-brief span of service. So he cannot afford to take the chance of antagonizing them on any one measure, even though he would be able to satisfy them on a hundred others, if his term were long enough. His constituents will also judge him by what he gets, or fails to get, in the way of governmental benefactions for his own district. He is expected to fetch home a new post-office building, or an appropriation for dredging some local harbor, or a mail airport, or something else that will at least serve to indicate his alertness at Washington. He must also get places on the public pay roll for some of his prominent supporters. If he comes back empty-handed, he gives his opponents a talking point in the next campaign. The test of a congressman's success is his ability to keep somebody else from being his successor in Congress.

PERSONNEL OF THE HOUSE.

Fewer than one fourth of the members, as a rule, are first-termers.[2] Even these have usually had political experience as members of state legislatures or city councils. It is only on rare occasions that anyone is elected to either branch of Congress without having previously served in some other public office. A large fraction of the membership is composed of lawyers, usually about sixty per cent. The percentage of lawyers in both Houses has always been considerable and has sometimes been the subject of complaint.[3] The

[1] A congressman once admitted that it was his custom to put in one pile all the letters and telegrams which came from his district in favor of an important measure. Then, in another pile, he put all the telegrams and letters opposing it. When the time came for voting on the measure he took a glance at the two piles and, unless he found some good reason to the contrary, voted with whichever was the higher.

[2] In the Seventieth and Seventy-first Congresses, indeed, the new members constituted only twelve and fourteen per cent respectively. Formerly the situation was different. According to James G. Blaine, who served in ten successive Congresses down to 1875, they always constituted at least a majority in his day.

[3] Thomas Jefferson, for example, remarked in his *Autobiography:* "If the present Congress errs in too much talking, how can it be otherwise in a body to which the people send one hun-

remainder includes persons of every conceivable occupation — physicians, dentists, teachers, journalists, merchants, farmers, locomotive engineers, steel workers, and (last but not least) professional politicians. The average age is about fifty years. A considerable majority of the members are college graduates or graduates of professional schools, although such graduates form only about two per cent of the country's entire population. If being a college graduate is a handicap in politics, as some practical politicians have asserted, the figures do not seem to bear it out.

ITS SESSIONS: THE OLD PLAN.

The House of Representatives holds one session a year, so that there are two sessions between elections. By the terms of the original Constitution, it was provided that the regular annual session must begin on the first Monday in December, unless Congress should choose to appoint a different day, which it never did. At any time during the previous nine months, the President could, of course, call a special session. Otherwise, the first session of a new House did not begin until thirteen months after its members had been elected. They were chosen in November to take office the following March, and then assembled in December. Meanwhile, the members of the old House met in December, immediately following the election, and held what came to be known as a "lame-duck" session until their terms expired in March.[1] The nickname of this session was inspired by the fact that it always contained a number of congressmen who had been defeated at the November elections.

AN ILLUSTRATION.

Perhaps this old arrangement can be made clearer by an example. In November, 1930, a new House of Representatives was elected to take office on March 4, 1931. But a session of the House, under the terms of the Constitution, was called for the first Monday in December, 1930. Newly elected members could not attend this session since their terms of office did not begin until the following March. So the old members returned to Washington and legislated for three months. Then, in December, 1931, the members who had been elected thirteen months earlier met for a long session which lasted until the midsummer of 1932.

Under this arrangement, moreover, the two sessions were always of unequal length. The session which began a month after a congressional election had to be a short one because the terms of members would

dred and fifty lawyers, whose trade it is to question everything, yield nothing, and talk by the hour? That one hundred and fifty lawyers should do business together, ought not to be expected."

[1] It may be noted that the outgoing House, in its "lame-duck" session, elected the President if no candidate had won a majority of votes in the electoral college.

officially expire in the following March; but the other session could be continued for a whole year if need be.[1] There were obvious disadvantages to this plan, and sometimes it was found necessary to call a special session immediately after the inauguration of a new President because there were problems of legislation which could not wait until the next December. This took place, for example, in March, 1933, when President Franklin Roosevelt assumed office in the throes of a banking crisis. At once he called Congress together for a brief special session to pass emergency banking laws.

OBJECTIONS TO THE OLD PLAN.

In order to correct this situation, to abolish "lame-duck" sessions, and to make all congressional sessions of potentially the same length, the twentieth amendment was added to the Constitution in 1933. It provides that Congress shall assemble each year on the third of January, unless it shall by law appoint a different date. Provision is also made that the terms of senators and representatives shall begin on January 3, and those of the President and the Vice-President on January 20. Under this new arrangement the members of the House of Representatives, who are elected in November, take office during the first week of January and immediately begin a first session which can continue for a full year if so desired; and the second session can be of the same length.[2] Lame-duck sessions, as well as the alternation of long and short sessions, have been reduced to a minimum.

THE TWENTIETH AMENDMENT AND THE NEW PLAN.

The debates in the House of Representatives are not of a high order. Nor are they so good as they used to be. Why should this be so? For one thing the membership has gradually increased to 435. The actual difficulty does not lie with the size of the House (the British House of Commons once had 707 members and now has 615), but with the size of the quorum. The Constitution prescribes that a majority shall constitute a quorum to do business — a majority, according to the precedents of the House, "of those members chosen, sworn, and living, whose membership has not been terminated by resignation or action of the House." The requirement seems unduly exacting when compared with practice in Great Britain (40 members), Canada

THE STANDARDS OF DEBATE IN THE HOUSE.

AFFECTED BY THE QUORUM REQUIREMENT.

[1] Each new Congress, when it assembles, is designated in all its official acts by a series number. The one which convened in 1789 was known as the First Congress; the one now in existence (1946) is the Seventy-ninth Congress. This explains the reference in official documents to "Fifty-fourth Congress, first session," or "Sixty-eighth Congress, second session," etc.

[2] Service in the House, as in the Senate, has now virtually become a full-time job. The salary of both senators and representatives is $10,000 per annum. In 1945 Congress authorized an "expense allowance" for members of the House amounting to $250 annually.

(20 members), or Australia (a third of the members); and, by way of escape, a new rule of 1890 reduced the quorum in the committee of the whole house, to which the constitutional requirement does not apply, from a majority to 100. In order to make a quorum in the House, members may attend unwillingly or under compulsion. They take little or no interest in the proceedings and often drown the voice of a speaker in a hum of conversation. He, in turn, far from being stimulated by a sympathetic audience, may have trouble enough in reaching the ear of the official stenographer. That a smaller quorum would lead to an improvement in debate is suggested by experience in the committee of the whole house and in foreign legislative bodies.[1]

For half a century before Thomas B. Reed became Speaker, the quorum, as fixed by the Constitution, opened the way to serious, if only occasional, abuses. When the two parties were of nearly equal strength, it was impossible — because of absences — for one alone to furnish a quorum. The minority could then prevent the transaction of business by refusing to respond during a roll call. Speaker Reed stopped that practice. When the Fifty-first Congress met, the Republicans had the quite slender majority of eight in a House of more than 330 members. They proceeded to unseat nine Democrats. When the first disputed election case was called up, the minority first demanded a roll call, then refused to vote, and finally raised the point of "no quorum." Thereupon, Reed directed the clerk of the House to record the obstructionists.[2] Upon appeal the House sustained the Speaker's decision and shortly afterwards embodied it in the rules. Indeed, the precedents of the British House of Commons and of American state legislatures gave overwhelming support

[1] Under the Third Republic, the French Chamber of Deputies fixed the quorum at a majority of the membership, vacancies not being deducted. The difficulty of maintaining so large an attendance is shown by this rule: that, if a vote failed for want of a quorum, the same question could be brought forward at the next sitting and decided irrespective of the number present. For the purpose of technical compliance, the Chamber sometimes adjourned for fifteen minutes and then began a new sitting.

[2] Almost unparalleled disorder followed. The Democrats, filled with impotent rage, "exhausted the vocabulary of vituperation in their attacks upon the Chair: 'Tyrant,' 'Czar,' 'despot,' were among the milder oratorical projectiles hurled at the Speaker. Reed sat serene and confident. The occasional protest of an individual member could at times be heard above the din. 'I deny the right of the Speaker to count me as present,' shouted McCreary of Kentucky. With that unfailing touch of humor which so often turns wrath into mere protest, Reed replied, 'The Chair simply stated the fact that the gentleman from Kentucky appears to be present; does he deny it?' An 'arbitrary, corrupt, and revolutionary action' was the denunciatory comment of Breckenridge of Kentucky. The folly of verbal protest being apparent, . . . members dodged under their desks, behind screens, bolted for the doors. In the mad rush for the exits, members lost all sense of official dignity and some of them incurred physical injuries. Upon the order of the Chair, the doors were bolted; and with each test of the quorum count, the defiant minority spent their anger in madly raving about the chamber — pictures of furious inefficiency." H. B. Fuller, *The Speakers of the House* (Boston, 1909), pp. 220–221.

to his position. And why does the Constitution say that a minority may be authorized to compel the attendance of absent members, if their attendance cannot be made effective? The old doctrine of the "disappearing quorum" — of physical presence and constructive absence, was a procedural absurdity.

The character of the debates is also affected by the great size and bad acoustics of the chamber in which the sessions are held. Only a leather-lunged orator can make himself heard in every part of it. "It does not always happen that a powerful mind and a powerful voice are combined in the same individual, and often the member with a real message cannot be heard, while the member with nothing to say has no difficulty in filling the chamber with sound." [1] From its galleries the House does not strike the spectator as an impressive body. There is too much inattention, interrupting of speakers, and general clatter. A generation ago the situation was much worse,[2] but the auditorium has now been reduced in size and otherwise improved. The acoustic qualities remain, nevertheless, the worst of any great legislative chamber in the world.

CHAMBER NOT WELL ADAPTED TO FORENSIC ARGUMENT.

To some extent, again, the dearth of good speeches is due to the strict limitation upon the time during which any speaker may keep the floor, and something may be attributed to the custom of allowing a member to have his speech printed without delivering it at all. Why should congressmen make carefully prepared speeches, or why should others listen to them, when it is so easy to print what anyone has to say, and then place it (at the public expense) in the hands of whoever desires to read it? Members, therefore, ask for "leave to print," or for "leave to extend their remarks in the *Record*," and this request, while it requires unanimous consent, is almost always granted. Copies of such speeches, often written for the congressman by his versatile secretary, are printed without ever having been delivered. Then thousands of copies are struck off by the government printing office and sent through the mails, free of

IT IS EASIER TO PRINT SPEECHES THAN TO DELIVER THEM.

[1] S. W. McCall, *The Business of Congress* (New York, 1911), pp. 108–109.

[2] Before the construction of the first House office building — a second was provided later, the cost of both marble structures aggregating about $13,000,000 — members used their individual seats and desks as a workshop. They paid little attention to debates, transacted routine business, wrote letters and speeches, slammed desk lids, clapped their hands to summon pages. "All this," said McCall (p. 109) "serves to increase the disorder and imparts to the hall the appearance of a vast business office, with its multitude of clerks, rather than of a legislative chamber of a great nation." Such a shocking condition could not last indefinitely. The removal of the desks occurred when the first office building had been finished and when, after the census of 1910, the addition of forty-four members required a more compact arrangement of seats. A luxurious office building for senators, connected with the capitol by a subway and monorail electric car, cost (with later enlargements) over $7,000,000.

postage, to voters in the districts from which the congressmen come. The "franking" privilege, or right to make free use of the mails for all official business, has been grossly abused in this way. Magazine articles and even whole books have sometimes been reprinted and distributed by congressmen at the public expense.[1]

All these things contribute to the absence of much genuine oratorical effort in the House, but they do not account for it entirely. The stupendous mass of routine business which comes before the House day after day is the greatest of all barriers to eloquence. The House is too busy to hear orations or even read them. The mechanical work of winnowing the chaff from the wheat among the grist of bills and putting the residuum through their various stages takes almost every moment of its time. At its two sessions the House receives from ten to fifteen thousand bills and joint resolutions. Of this total less than fifteen per cent are reported from committees and placed on the appropriate calendar; less than six per cent enacted into law. Speaker Reed once remarked that the House was a "deliberative but not a deliberate body." He was not intending to be facetious but merely to point out that there is a difference between having the function of deliberation and having the time in which to perform it. If the House held itself to a deliberate consideration of every measure, it would never get its work done by sitting twenty-four hours every day in the year. Accordingly, it is essential to place strict time limits on the speeches of those members who have failed to equip themselves with terminal facilities.

THE PRESSURE OF ROUTINE BUSINESS LEAVES LITTLE TIME FOR SPEECH-MAKING.

So the House of Representatives is not so much a lawmaking as a law-killing body. There is a large amount of imperative business (voting of appropriations, particularly) which must be given the right of way. And no one can wax oratorical over an item for putting a wing on the post office at Keokuk, or new desks in the Indian school at Big Creek, or fathometers on the vessels of the iceberg patrol, or the other minutiae of a segregated budget. Hence only matters of uncommon interest and importance become the inspiration of a real debate on the floor of the House itself. Visitors go to the gallery, sit there an hour, and usually come away disappointed. They tell you that anyone can hear better speeches, with better attention paid to them, at Rotary Club luncheons or college football rallies. Emerson once wrote, after a visit to England many years

A FINAL — AND PRACTICAL — CONSIDERATION.

[1] In deference to public criticism, congressmen now usually pay for their reprints and emblazon boldly on the covers the words "Not printed at the public expense." But the free mailing privilege is still generally used.

ago, that "a kind of pride in bad public speaking is noted in the House of Commons, as if the members were willing to show that they did not live by their tongues." Today this might be written of the House of Representatives, although it has ceased to be true of the House of Commons.

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D. S. Alexander's *History and Procedure of the House of Representatives* (Boston, 1916) contains the best short sketch of the evolution of the House. W. F. Willoughby, *Principles of Legislative Organization and Administration* (Washington, 1934) contains valuable discussion and an excellent bibliography. Other useful books are Robert Luce, *Congress: An Explanation* (Cambridge, Mass., 1926), the same author's *Legislative Assemblies* (Boston, 1924), G. R. Brown, *The Leadership of Congress* (Indianapolis, 1922), P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927), E. C. Griffith, *The Rise and Development of the Gerrymander* (Chicago, 1907), and L. F. Schmeckebier, *Congressional Apportionment* (Washington, 1941). Mention should likewise be made of the brilliant study first published many years ago by Woodrow Wilson entitled *Congressional Government* (new edition by R. S. Baker, Boston, 1925).

The *Congressional Directory*, giving information about the membership of Congress, is published for each session by the government printing office.

See also the references listed at the close of Chapter XX.

CHAPTER XX

THE HOUSE OF REPRESENTATIVES AT WORK

Liberty, to be enjoyed, must be limited by law, for where law ends tyranny begins, and the tyranny is the same, be it tyranny of a monarch, or of a multitude — nay, the tyranny of the multitude may be the greater, since it is multiplied tyranny. — *Edmund Burke.*

Both Houses of Congress meet in the Capitol, a monumental building of marble and sandstone surmounted by a great dome, which is situated at one end of Pennsylvania Avenue, about a mile away from the White House. The hall of the House of Representatives is in the south wing of the Capitol. It is arranged in auditorium fashion, with the seats in a semicircle facing the Speaker's platform. Until 1913, every member had his own seat, assigned to him by lot at the beginning of the session. But, with the removal of desks from the House and the provision of offices in an adjacent building, the practice changed. Members now take any vacant places that suit their fancy. They move around a great deal and carry on conversation even when a debate is proceeding. It is only when the buzz becomes too audible that the Speaker bangs his ebony gavel on the marble slab in front of him.

WHERE THE HOUSE MEETS.

When a newly elected House assembles, its first duty is to organize. The roll is called to determine the presence of a quorum, and during this first roll call the clerk of the last House presides. The oath of office is then administered to the members. If the validity of any member's claim to a seat is questioned, he does not take the oath until after the House has been organized and the matter decided on its merits. Then the election of a Speaker is in order. The House also chooses its other officers, including the chaplain, sergeant-at-arms, clerk, and doorkeepers. The rules, usually those of the preceding Congress, are provisionally adopted to stand until altered; and the House is then ready to proceed with the business of legislation. At this point the House joins the Senate in sending a committee to notify the President of their readiness to receive any communication that he may desire to make.

HOW THE HOUSE ORGANIZES.

THE HOUSE RULES.

The House of Representatives has full power over its own rules of procedure. The first House, in 1789, adopted a set of rules based largely upon those which had been used in the congress of the confederation. These, again, had been modeled on the rules of the colonial assemblies, which harked back to the procedure of the English House of Commons. Each succeeding House since 1789 has readopted these original rules with various changes from time to time. On a few occasions there has been some revision, but many of the provisions which were adopted in 1789 still remain unaltered. The rules of Congress, therefore, are not the work of any one man. They are an evolution, the growth of many centuries of legislative experience. Some of them, such as, for example, the provision that a bill shall be given three readings, go back to mediaeval days in English parliamentary history. In 1837 the House adopted a provision, which is still in force, that it should be guided by Thomas Jefferson's famous *Manual* in all matters not covered by its own rules and not inconsistent therewith, but this compendium is now rarely referred to.[1] The House has developed its own long series of rulings and precedents which cover almost every contingency that can possibly arise.

THEIR COMPLICATED CHARACTER.

Much dissatisfaction has been expressed from time to time with the existing rules of the House. Complaint is made that they are needlessly complicated and place too much power in the hands of the House "machine," which is made up of the majority leaders. It is true that the rules and precedents are numerous and complicated; but the work of the House is complex, and the rules must adapt themselves to this circumstance. It is also true that the rules give an advantage to the majority leaders, but is that not in accordance with a sound theory of lawmaking? If we are to have legislation by majorities, is it unreasonable to provide the majority leaders with the means of making this principle effective?

PURPOSES OF THE RULES.

All rules of legislative procedure have two purposes, and only two: the first is to expedite business; the second is to ensure that business shall not be rushed through without giving the minority an opportunity to express its dissent. Obviously it is difficult to frame rules which will serve both these purposes equally well. Without some limitations on the freedom of debate, a small minority could delay business unduly and thus defeat the purpose of representative government. That is why the House rules, for more than a century

[1] When Jefferson was Vice-President (1797–1801), he prepared this compilation of parliamentary procedure to assist him in his duties as presiding officer of the Senate. It was based largely on English practice.

and a quarter, have permitted debates to be brought to a close by "moving the previous question." If such a motion is supported by a majority, the question which is being debated must then be voted on by the House without further delay. Likewise, the rule which permits the presiding officer to reject any motion which he regards as dilatory owes its origin to the same problem of getting business done without needless delays. The Speaker, by the way, though assumed to carry a knowledge of all the rules and precedents in his head, does not have any such miraculous gift of memory. Such an aptitude, if he possessed it, would be in truth phenomenal, for the House precedents in printed form occupy no fewer than eight large volumes.[1] So the Speaker keeps at his right hand an assistant known as the parliamentary clerk, or "parliamentarian," whose sole duty is to become thoroughly conversant with this formidable mass of material and advise the chair whenever difficult questions of procedure arise.

THE SPEAKER OF THE HOUSE

The Speaker, who presides over sessions of the House, is its central figure. His office is both ancient and honorable. In the English House of Commons the office of Speaker originated long before America was discovered. The Speaker was dominated by the crown during the strong monarchy of the Tudors; but in the seventeenth century, as civil war approached, the office threw off this dependence and became an instrument of the Commons. On one occasion well known to students of English history, Charles I strode into the House with a body of soldiers and demanded that the Speaker point out to him five of its members whom he intended to arrest. But the Speaker, at considerable risk to himself, replied that he had "neither eyes to see nor tongue to speak save only as this House doth command." The king, finding himself balked in his quest, withdrew in high dudgeon from the chamber. The speakership was naturally transplanted to the colonial assemblies in America, and here also its tradition continued to hold good. Accordingly, a provision was written into the Constitution of the United States that "the House of Representatives shall choose their Speaker."

ORIGIN OF HIS OFFICE.

But the office of Speaker in America presently came to differ from that which had so long existed in the land of its origin. In the House of Com-

[1] These precedents are brought together in Asher C. Hinds, *Precedents of the House of Representatives of the United States* (5 vols., Washington, 1907), and Clarence Cannon (Vols. VI–VIII, Washington, 1935). One might mention here Henry H. Gilfrey's *Senate Precedents* (Washington, 1909).

mons the Speaker has been gradually stripped of partisanship, debarred by custom from engaging in debate or displaying favoritism to one side or the other. In time he became an absolute neutral in the discharge of his functions, never giving members of his own party the slightest preference or allowing himself to be drawn into any controversial discussion. When required to give a casting vote, he does it by rule, and not according to any preference of his own. Whether the makers of the Constitution, when they gave the House of Representatives the right to choose its own Speaker, had in mind something of this sort, we do not know. In any event, they placed no restrictions upon the office, but left it to develop its own traditions. And it was not very long before the Speaker of the House began not only to be a strong partisan but to gather power into his own hands. Throughout the nineteenth century he gradually gained a place of influence in the majority party and eventually became the most powerful figure in national administration, next to the President himself.[1]

ORIGINAL CHARACTER OF THE SPEAKER'S OFFICE.

THE CHANGE IN AMERICA.

Why and how did this development of the Speaker's authority take place? Well, to begin with, it arose out of the fact that the Constitution provided the House with no official leadership. Apparently the statesmen of 1787 took it for granted that the House would lead itself. At any rate, they departed from long-standing British practice by prohibiting the heads of the various executive departments from becoming members of Congress. In their desire to establish a system of checks and balances, they forced the executive and legislative branches of the government apart, leaving both Houses of Congress to work out their own plans for leadership as the need might arise.

GROUNDWORK OF THE SPEAKER'S POWERS.

This lack of official leadership was not seriously felt by the House at the outset, because it was a relatively small body and did not have a great deal to do. But, as the population of the country increased, so did its membership. With this expansion in size, and with the even more rapid growth of legislative business, the need of a guiding hand became more urgent. What more natural, therefore, than the gravitation of leadership into the hands of the Speaker — the only officer chosen by the House from its own membership? That, at any rate, is what happened. Beginning with Henry Clay, the Speaker gradually became the recognized leader of the majority party, and hence of the House as a whole. He became the man on whom the majority

THE NEED FOR LEGISLATIVE LEADERSHIP.

[1] M. P. Follett, *The Speaker of the House of Representatives* (New York, 1904).

depended for getting its measures safely through the maze of rules. More and more authority was absorbed into his hands until he became a virtual dictator of legislation. From time to time there were vigorous protests against this concentration of powers in the chair, but not until 1910–1911 was the process brought to an end, and the authority of the Speaker substantially curtailed.

HOW THE SPEAKER IS CHOSEN.

Before explaining the Speaker's powers, past and present, a word should be said concerning the method whereby he is chosen. In theory, the choice is always made by the House itself at the beginning of each Congress, that is, every second year. In practice, however, it is always agreed upon, before the House meets, by a caucus composed of members of the majority party. If the same political party controls the House, and the Speaker in the last Congress comes back for another term, it is customary to reelect him. To be chosen Speaker is a high honor, one which goes only to a man of considerable experience in Congress and of undoubted prominence in his party. If a change takes place in the relative strength of the parties as the result of an election, the next Speaker is likely to be the man who served as floor leader of his party when it was in the minority. In either case, it is the majority caucus that makes the choice. The House simply ratifies it.

HIS SPECIFIC POWERS:

1. TO PRESIDE AND RECOGNIZE.

At the outset the rules and usages of the House merely authorized the Speaker to preserve order, to sign bills and documents, and to put questions to a vote. As a regular member of the House, he has always had the right to vote on all questions, not merely in case of a tie. The regulations of the House, likewise, have permitted him to call on any other member to take the the chair temporarily. But many other prerogatives grew out of these. As the House became larger, and debates grew more partisan, the Speaker's power to "recognize" members developed in importance. With limitations upon the time available for the discussion of any subject, and several members desiring to be heard, the Speaker found himself able at times to direct the course of debate in favor of his friends. For no member can address the House without first obtaining the Speaker's recognition. When two members rise to be recognized, the Speaker keeps his eyes under perfect control; under some circumstances he has entire discretion to see one congressman and not the other.

But this power of recognition has less importance than is sometimes attributed to it. Its scope has been gradually reduced by the rules and

precedents of the House.[1] One illustration may suffice: On Calendar Wednesday, when the name of a particular committee has been reached, its chairman calls up a bill. He is recognized automatically for one hour. During that hour he may yield time to supporters and opponents of the bill, and, before losing the floor, move the previous question. On the other hand, if the bill is controversial and needs more thorough discussion, the committee chairman and the ranking minority member of the committee, with the approval of the House, may assign a period of less than two hours for general debate. Each controls half the period, yielding small portions of it to various representatives. In such cases the Speaker has little or no discretion in recognizing one member instead of another. The situation is much the same when privileged committees exercise their right to report at any time, or when the rules committee brings in a special order.

POWER OF RECOGNITION NOW OF LITTLE IMPORTANCE.

Even in older days the power of the Speaker to use his own judgment in recognizing members had something to be said for it. Before the setting up of the "consent calendar" in 1909, members of the House frequently tried to secure the passage of pet bills, bills designed to improve their chances of reelection, by unanimous consent; that is, without scrutiny and debate. They relied upon the good nature of their fellow members to interpose no objection. But the Speaker, as a member of the House, could object; and he often did so from a sense of responsibility to prevent what was becoming a serious abuse. Unless the measure had been explained to him beforehand, and unless its sponsor could demonstrate that it was unobjectionable, the Speaker would merely decline to recognize anyone asking passage by unanimous consent.[2] Members of the House did not like this way of doing things, feeling that it gave the Speaker too much

WHY REPRESENTATIVES CURTAILED IT.

[1] According to the House *Manual* (754) "he is not a free agent in determining who is to have the floor. The practice of the House establishes rules from which he may not depart . . . It is because the Speaker is governed by those usages that he often asks, when a member seeks recognition, 'For what purpose does the gentleman rise?' By this question he determines whether the member proposes business or a motion which is entitled to precedence."

[2] "Congressman Sulzer of New York once applied to Speaker Reed for recognition to pass a pension bill for an old soldier. Mr. Reed took the bill, read it over, and then said to Mr. Sulzer: 'This man is not entitled to a pension under the law. I am worried nearly to death with these pension bills.' 'I know it,' good-naturedly replied Sulzer, 'but just think of it, Mr. Speaker, if I do not pass this bill it will be the death of this poor old soldier. Recognize me and I will get it through in a few minutes, and I will save two lives, yours and his.' Sulzer had scarcely descended the steps from the Speaker's chair, when Mr. Reed announced: 'The gentleman from New York is recognized to pass a pension bill. All in favor signify by saying "Aye"; those opposed "Nay." The bill is passed and two lives are saved — the old soldier's and that of the gentleman from New York.' The House laughed, but only the Speaker and Sulzer understood the joke." H. B. Fuller, *The Speakers of the House* (Boston, 1909), p. 240.

power, so they took this privilege away. The consent calendar (see p. 341), which was established by the House rules in 1909, has done away with the Speaker's discretion in according or denying recognition when unanimous consent is being asked.

2. TO MAINTAIN ORDER.

Like the presiding officer of any gathering, the Speaker of the House has the right to call members to order. This he does by a word of caution or by banging his gavel. The rules of the House with respect to order are strict. Members must keep within bounds in their references to one another, must address the chair respectfully, must not wear hats or smoke in the House, and must obey the Speaker's rulings. If the Speaker calls a member to order, he must immediately sit down unless, on the motion of another member, he is permitted to explain. After such explanation the House decides the case without debate. In case of recalcitrance, the House may pass a vote of censure or apply appropriate punishment. In extreme cases the Speaker may suspend business until his rulings are obeyed, or he may instruct the sergeant-at-arms to quiet any disorder in the House. But the Speaker cannot censure or punish a member. Only the House itself can do that.

3. TO INTERPRET AND APPLY THE RULES.

HE MAY MAKE NEW PRECEDENTS.

The Speaker has always had the right to interpret the rules of the House and to settle disputes arising under them. Yet, contrary to English practice, appeal may be taken against most of his decisions. On many matters the rules are quite explicit, and the Speaker has no choice but to accept their obvious meaning. He is also under a certain obligation to follow the established precedents, although it is within his power to disregard them and to create new ones, provided that the House acquiesces. This power to make precedents, and to break them, is one of the things which enabled the Speaker to gain — because the House acquiesced in it — a dominating influence over the course of business. The process was gradual, sometimes depending upon the initiative of the House, sometimes upon the initiative of the Speaker himself. It was the Speaker, for example, who first refused to permit motions that he deemed dilatory in purpose and who, in determining the presence of a quorum, counted all members actually present. No succession of weak men could have brought the office of Speaker to this pinnacle of power. The men who occupied the chair during the greater part of the nineteenth century were strong in will and personality. They were, for the most part, men of dominating character, although by no means always of high political standards.[1]

[1] The list includes Henry Clay, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, Thomas B. Reed, and Joseph G. Cannon.

Nor was it merely a matter of strong personalities. The Speaker's power grew hand in hand with the growing authority of the committee on rules, of which he was chairman. Originally the committee on rules was a special (not a regular) committee, its only function being to recommend a set of rules for the House at the beginning of each new Congress. This task was a relatively inconsequential one, because the committee, as a matter of custom, merely recommended that the rules of the preceding Congress be adopted with perhaps a few minor changes. In time, however, the practice developed of referring to this committee all proposals for alterations in the rules during the course of each session; it then became one of the regular standing committees of the House and presumably received the right to report a new rule at any time or for any purpose, thus enabling it to intervene and cut a knot whenever business in the House became tangled. In this way the committee on rules, with the Speaker as its chairman, developed a rule-proposing power which amounted to a virtual control over the progress of all measures in the House. With the committee on rules ready to do his bidding, and a majority of the House on his side, the Speaker could secure at any time the adoption of a special rule to advance measures which he favored, or to delay measures which he opposed.

HIS OLD RELATION TO THE COMMITTEE ON RULES.

The House could not be expected to tolerate this legislative dictatorship forever, and the mutterings against it became louder as time went by. Members found that they had to make terms with the Speaker before their measures had any chance of passage. Some relief was afforded in 1909 by establishing Calendar Wednesday and the consent calendar, but not until 1910 did the House secure a favorable opportunity to strike a more severe blow at the autocracy of the gavel. In that year a group of insurgent Republicans combined with the Democrats to clip the Speaker's wings. As the outcome of a House rebellion, they took from him the power to appoint the all-important committee on rules, increased this committee's membership, and provided that the Speaker should henceforth be ineligible to a place on it. The committee on rules is now made up of fourteen members (ten belonging to the majority) who are chosen, like other committees (nominally at least), by the House itself. Its powers remain as before, but the Speaker is no longer in a position to dictate what this committee shall do.

THE "REVOLUTION OF 1909–1911."

The "grand remonstrance" of 1910, moreover, did not end the wing-clipping process. There was another prerogative of the Speaker which the rebellious House decided should also be taken away from him. This

was his power to appoint the chairman and members of all other House committees. In theory, this power had always belonged to the House itself, but, as a matter of convenience, the duty of appointing committees had been turned over to the Speaker in days when the House was small and the work of its committees relatively unimportant. In the course of time, however, and for various reasons, the real control of business passed from the House as a whole into the hands of its standing committees—those numerous "little legislatures" which settled the fate of bills in an atmosphere of secrecy and irresponsibility. Both political parties for many years acquiesced in this drift of affairs; but in the early years of the twentieth century, a group of Republican insurgents decided to join with the Democrats in a war of liberation directed chiefly against the powers of the Speaker. By packing the committees with his own friends and by appointing a docile chairman, they complained, the Speaker could control the course of legislation; for when he gave the word of command, these chairmen, as his creatures, usually obeyed. This was not lawmaking by due process, they said, but by decree.[1] Emboldened by the victory which they won at the polls, and now in control of a House majority, the Democrats decided to go a good deal farther than they and their insurgent Republican allies had gone in 1910. In April, 1911, accordingly, they proceeded to change the rules in a way which took the selection of standing committees and committee chairmen entirely out of the Speaker's hands, by providing that all such appointments should henceforth be made by the House itself.

THE APPOINTMENT OF COMMITTEES: THE OLD METHOD.

COMMITTEES OF THE HOUSE

The House, as has been said, does most of its work through standing committees. These committees are now ostensibly elected by the House itself. But what really happens is this: when a new Congress assembles, the members of each political party in the House hold a caucus or "conference." Each caucus selects a group of its own members to participate in the work of slate-making. The Republican caucus (or conference) appoints a "committee on com-

THE NEW METHOD.

[1] As a matter of fact, most Speakers had exercised no such autocracy as these critics asserted. Most of them followed the principle of seniority, just as the House itself has done since it changed the rules; but Speaker Cannon (1903–1911) broke away from the seniority principle at least a half dozen times in appointing committee chairmen, and on three of these occasions the new chairman was a congressman who had never served on the committee at all. He just went over the heads of men who had been serving on the committee for years. As a measure of discipline he likewise removed one chairman, demoted one committeeman, and removed two others. For a discussion of Cannon's highhandedness see C. W. Chiu, *The Speaker of the House of Representatives since 1896* (New York, 1928).

mittees," which arranges the assignments of Republican members to all the standing committees. The Democratic caucus does not set up a special committee on committees but merely selects the Democratic members of one standing committee, namely, the committee on ways and means, and they in turn proceed to determine the assignments of Democratic members to all other committees. The numerical superiority which the dominant party maintains on all committees depends somewhat, but not entirely, on its relative strength in the House as a whole.[1] The two selecting groups work independently and then their lists are put together into a combined slate. Thereupon the final slate is submitted by each group to its own caucus, and having been approved there, is reported to the House, which accepts it without change. So, while it is technically accurate to say that the House elects all its regular committees, the actual selection is in the hands of relatively small groups representing the majority and the minority parties.

USAGE IN THE SELECTION OF COMMITTEES.

CHAIRMANSHIPS.

Certain long-standing customs are observed in assigning members to the various committees. It is well understood, for example, that seniority should be recognized in making up the lists. Chairmanships go to members of the majority party who have had the longest continuous service on their respective committees. This being so, leaders of both majority and minority show great caution in placing representatives on important committees; as a rule, they reserve judgment on character and capacity until they have had candidates under prolonged observation. The best that a new member can ordinarily expect is an assignment to three or four of the less influential committees. Then, if he is reelected to the next Congress, and if vacancies occur on more important committees, he may hope for a place on one of them. In time, if his party remains in control of the House, and his own district continues to reelect him, he may rise to be the ranking member of the committee and eventually its chairman. Various considerations besides seniority are also taken into account. Geography, for example, is a factor. Not all the members of any major committee are ever selected from one section of the country.[2] Likewise a congressman's personal preferences are taken into account.

[1] In the Seventy-eighth Congress (elected in 1940) the Democrats held only 51 per cent of the seats; but 10 of 14 places on the rules committee, 25 of 40 on the appropriations committee, and 15 of 25 places on ways and means, judiciary, foreign affairs, etc., went to them. On the other hand, in the Sixty-eighth Congress, when the Republicans had a majority of 16, and in the Seventy-second, when the Democrats had a majority of 11, the relative strength on committees of 21 members was normally 12 to 9.

[2] Nevertheless, when the Democrats win control of the House, the chairmen of almost all the important committees are drawn from the Solid South; and, when the Republicans resume control, the key chairmanships go mainly to the Northeast and Middle West.

But his individual ability and his qualities of leadership rarely have much to do with it. In order to become chairman of a committee, therefore, a congressman need only live long enough, get himself continually re-elected, and stay on the same committee.

OBJECTIONS TO THE "SENIORITY" RULE.

In many ways this is unfortunate. It holds back men who have a natural aptitude for committee work, and pushes forward others who have little or no administrative ability. The House depends upon its various committees for the success of its work, and the committees, in turn, lean on their chairmen. Sometimes they find themselves leaning on a slender reed, for length of service is no sure guarantee of anything except a congressman's capacity to get votes in his home district. All this is well recognized, and from time to time there have been proposals to abandon the seniority rule. But it is not certain that the gain would outweigh the loss. The procedure of Congress has become so complicated that none but experienced members can thread their way through its meshes; hence the senior congressmen are bound to be influential, no matter how the committees are made up. If the seniority rule were abolished, there would probably be a long and bitter fight over the assignments at the beginning of each new Congress, thus delaying and rendering more difficult its work during the remainder of the session.

THE ORGANIZATION OF HOUSE COMMITTEES.

The House has forty-seven "standing" or regular committees, but not all of them have any important work to do.[1] Some committees hold only one or two meetings a session, and a few never meet at all. These inactive committees are maintained, year after year, because every committee, no matter how inconsequential it may be, is entitled to an office, a secretary, an allowance for clerk hire, and various other perquisites. Sometimes the wife, daughter, or other relative of the chairman, is employed as clerk. It occasionally happens, of course, that some unexpected development gives a measure of prime importance to an unimportant committee and galvanizes it into action; but otherwise a committee of this type merely "meets at the call of the chairman," which means that it may be allowed to forget its own existence.

THE MOST IMPORTANT COMMITTEES.

The most important committees of the House are those on rules, ways and means, appropriations, judiciary, interstate and foreign commerce, post offices and post roads, military affairs, naval affairs, rivers and harbors, banking and currency, agriculture, public lands, labor, civil service, immigration, and pensions.

[1] The number was reduced from 61 to 47 in 1927, six years after the Senate had reduced its committees from 75 to 33.

In most cases the functions of these committees are indicated by their titles. They vary little in size, except for the rules committee with 14 members and the appropriations committee with 40; the others have 21 or 25 members. The number of committees to which a representative may be assigned depends a good deal upon the relative strength of the parties; in the Seventy-eighth Congress (elected in 1942) many Democrats served on five or six committees as the only means of maintaining a Democratic preponderance of 15 to 10 on all of them.[1] For the past twenty years and more, the majority has designated certain committees as "exclusive," confining a member of any such committee to service upon it alone. The exclusive list usually includes rules, ways and means, appropriations, judiciary, and a few others; but practice varies with the composition of the House. The major standing committees meet frequently, using for this purpose the forenoon hours when Congress is not sitting.

THE SUB-COMMITTEES.

So much work is now thrown on the more important committees — especially the committee on appropriations — that they are compelled to apportion a good deal of it among subcommittees. These are appointed by the main committees, usually through their chairmen, and are given some specific matter to deal with, for example, the overhauling of the income tax schedules or the revision of the postal laws. Occasionally one of these subcommittees will hold the hearings on a measure, thus saving the time of the other committee members. Subcommittees always report to the main committee and not to the House.

SPECIAL COMMITTEES.

From time to time the House orders the appointment of a special committee to deal with some new and unusual question. In the early days it appointed such committees very frequently; but there are now so many regular committees, and their range is so inclusive that special committees are not often needed. Like the Senate, the House also has the right to appoint committees of investigation and occasionally it does so.[2] Such committees are empowered to summon witnesses, examine them under oath, and compel the production of papers. The rules of the House still allow the Speaker to appoint such committees when they are authorized, and also to name the House "managers," or conferees, on committees of conference with the Senate.

[1] The Democrats had a clear majority of 10 seats in that Congress. Since they had a large majority in the Seventy-fifth Congress, only four representatives sat on five committees, while 47 sat on four.

[2] For the basis of this power to conduct investigations, see p. 362.

These conference committees are special committees in that they are appointed to perform a single definite task and, when that is done, they immediately dissolve. This task of adjusting differences between the two Houses may take them only an hour, or it may drag on for weeks. The reason for committees of conference has been already explained: namely, that, when the House and the Senate fail to agree upon any measure, one of them having passed the measure with amendments which the other declines to accept, it becomes necessary to hold a conference of representatives from both chambers with a view to reaching a compromise. So the presiding officers of the Senate and the House each appoint a small group of conferees, sometimes as few as three, sometimes as many as eleven, and not necessarily the same number for each House. This joint committee of conference then meets behind closed doors and tries to work out something that both the Senate and the House can be persuaded to accept. The problem of doing this may be an easy one — merely splitting the difference on a few items. Or it may be that there are many differences to be taken up, one by one, and adjusted by the process of give and take.

CONFERENCE COMMITTEES.

A conference committee is not supposed to put into a measure anything that is not already there, but sometimes this limitation is disregarded and a general reshaping of a bill at the hands of the committee is found essential in order to make it acceptable. Sometimes, on the other hand, the conferees are unable to agree at all, in which case the whole measure fails of enactment, unless both Houses agree to appoint another conference committee, which they rarely do. But if the conferees reach an agreement, they report it to their respective chambers and generally it is accepted. A report from a conference committee is privileged; it may be presented at any time, and no amendments to it are in order.

Mention should also be made of one other House committee, the committee of the whole. This is merely the entire membership of the House sitting as one great committee. The purpose is to expedite business, and to this end there are several important differences between the House in committee of the whole and in regular session. In committee of the whole the Speaker does not preside, but calls upon some member to act as chairman; the strict rules of procedure do not apply; the previous question may not be moved; one hundred members make a quorum; there are no roll calls; and, after general debate, for which the House has previously arranged the details, no member may speak longer than five minutes except by unanimous consent — in a word, the arrangement enables the House to debate informally and push ahead. Large use is made of this facility, and

COMMITTEE OF THE WHOLE.

the House probably sits a larger number of hours in committee of the whole than in regular session. All bills raising revenue or appropriating money, directly or indirectly, must go to the committee of the whole.

REFERENCES

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GENERAL METHODS AND PROCEDURE. D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), S. W. McCall, *The Business of Congress* (New York, 1911), H. C. Remick, *The Powers of Congress in Respect to Membership and Elections* (Princeton, 1929), and George R. Brown, *The Leadership of Congress* (Indianapolis, 1922), all deal with matters which have been outlined in the foregoing chapter. Four books by Robert Luce, a congressman of long experience and wide knowledge, deserve special mention because of the wealth of material which they contain. These volumes, some of which have already been cited in earlier chapters, are *Legislative Procedure* (Boston, 1922), *Legislative Assemblies* (Boston, 1924), *Legislative Principles* (Boston, 1930), and *Legislative Problems* (Boston, 1935). See also the references at the close of Chapter XIX. The rules of procedure may be found in the *House Manual and Digest.*

THE SPEAKER. On the position and powers of the Speaker the reader is referred to H. B. Fuller, *The Speakers of the House* (Boston, 1909), M. P. Follett, *The Speaker of the House of Representatives* (New York, 1904), C. R. Atkinson, *The Committee on Rules and the Overthrow of Speaker Cannon* (New York, 1911), W. A. Robinson, *Thomas B. Reed, Parliamentarian* (New York, 1930), W. L. Webb, *Champ Clark* (New York, 1912), S. W. McCall, *The Life of Thomas B. Reed* (Boston, 1914), L. W. Busbey, *Uncle Joe Cannon* (New York, 1927), and the article by C. R. Atkinson and C. A. Beard, entitled "The Syndication of the Speakership," in the *Political Science Quarterly*, XXVI, pp. 381–414 (September, 1911).

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CHAPTER XXI

SOME FEATURES OF CONGRESSIONAL PROCEDURE

For this reason the laws are made: that the stronger may not have power to do all that they please. — *Ovid.*

THE PRESIDING OFFICER.

Except when the House is sitting in committee of the whole, the Speaker is in the chair. As has already been explained, he has a limited power of recognition — limited because the rules give the right of way to certain committees at certain times and because those controlling the time for general debate (perhaps the chairman and ranking minority member of a committee) yield it piecemeal to various supporters. There are, however, many requests for unanimous consent to address the House briefly or to extend remarks ("speechless speeches") in the *Record*. Any member wishing to make such a request customarily arranges in advance with the Speaker (either directly or through a floor leader) to be recognized when he rises; but he has a right to ask recognition without this prearrangement and take his chance of receiving it. He merely rises and addresses the chair: "Mr. Speaker, Mr. Speaker."[1] Turning to him, the Speaker asks: "For what purpose does the gentleman rise?" This is to determine whether the member's purpose is in order. Then the Speaker, if he

[1] Back in the time of Speaker ("Czar") Reed the power of recognition was sometimes put to strange uses, as the following incident shows: "The leader of the minority was known to have ready for presentation a resolution recognizing Cuban belligerency. The floor of the House was almost deserted, and the member rising from his seat, and calling 'Mr. Speaker,' stood out conspicuously. 'Mr. Speaker,' again repeated the leader of the minority. Meanwhile Dingley of Maine was seated at his desk, paying no attention to the surrounding affairs, and clearly absorbed in some tariff statistics. Reed, ignoring the member insistent upon recognition, gazed into space. Without any further activity on the floor of the House, the nasal drawl of the Speaker could be heard — 'The gentleman from Maine moves that the House do now adjourn. Do I hear a second? The motion is seconded. The question is now on the motion to adjourn. All in favor will say "aye." Those opposed, "no." The "ayes" have it. The — House — stands — adjourned,' punctuated with the sharp rap of the gavel. Dingley, awakened from his study by the noise, looked up with an inquiring air. He had uttered no sound, nor had there been an audible 'second.' Indeed the Republican members had been so completely unconscious of the proceedings that not over ten voted on the motion. Still the House stood adjourned." H. B. Fuller, *The Speakers of the House* (Boston, 1909), pp. 234–235.

decides to accord recognition, raps his gavel and announces, "The gentleman from Illinois," or "The gentleman from Texas." Members of the House are not addressed by name from the chair (except by way of reprimand) or by one another in debate. After being thus recognized, a member launches into his speech, but may be interrupted by any other member and asked to "yield the floor" so that some explanation or brief interpolation may be made. Whereupon the Speaker inquires, "Does the gentleman yield?" The member having the floor may then yield or not as he chooses, but the custom of the House is that a member usually does so when requested.

The Speaker may himself take the floor, and occasionally does so, but not so often as in the old days.[1] When the Speaker desires to participate in the discussion, he calls some member to take the chair temporarily. But whether in the chair or out of it, he has a vote on all questions, for by becoming Speaker he loses none of his rights or privileges as a member. Having once voted on a question, he may not, however, vote again to break a tie. In the case of a tie, if the Speaker has already voted, the motion is considered defeated. In roll calls on ordinary measures the clerk does not call the Speaker's name unless the latter requests it; but in calling the roll to determine the presence of a quorum, or to pass a measure over the President's veto, the Speaker is expected to vote.[2]

WHEN THE SPEAKER MAKES A SPEECH.

Leadership in the House of Representatives is exercised not only by the Speaker but by the floor leaders. Each party has its floor leader, selected by a caucus of its members at the beginning of every Congress. He is the official strategist of his party. When an important debate is in the offing, the two floor leaders get together and agree upon the amount of time which is to be allotted to each side for general debate. Then they make up a list of those who are to take part in the debate, so that the Speaker may recognize both sides fairly. Normally the chairman of the committee which has reported the bill and the ranking minority member control the time equally. Each uses a part of his time, but yields most of it, by prearrangement, to various supporters for periods of time of ten minutes or longer. Debating in the House is not left to run its course haphazard. So far as

THE FLOOR LEADERS.

[1] Participation in debate, whether from the floor or from the chair, varies with the personality of the Speaker. In eight years Cannon spoke eight times in the House, six times in committee of the whole; Clark, 18 and 45 times respectively. In six years Gillett spoke five times altogether; Longworth, 11. Floyd M. Riddick, *Congressional Procedure* (Boston, 1941), p. 59.

[2] According to the rules of the House, he is not required to vote except when his vote would be decisive; that is, when it would create or break a tie or a two-thirds majority or establish a quorum.

is practicable, everything is cut and dried in advance. The floor leaders are expected to keep things moving, yet not to let them get out of hand.

If matters seem to be reaching a point where the floor leaders are unable to hold their followers in line, there is always the party caucus to fall back upon. A floor leader can call his party members into caucus at any time to decide upon a course of action. Congressmen are not obliged to attend a caucus of their own party, although such an attitude may prove costly — for example, in the matter of committee assignments; but, if they do attend, they are regarded as being morally bound to abide by its decision. According to the Democratic rules, they are bound on a matter of policy or principle by a two-thirds vote of those present and voting at a caucus, if that two thirds constitutes a majority of the full Democratic membership of the House.[1] Caucus action is not usually taken except on measures which have become party issues. On bills of a routine sort, or which cross party lines, the members are left free to decide their votes for themselves. A good deal of criticism has been showered upon this practice of binding members by caucus decisions, but something of the sort has been found essential in the legislatures of all countries which have the party system.

THE PARTY CAUCUS.

STEPS IN THE PROCESS OF LAWMAKING

Having noted the functions of the Speaker, the floor leaders, the caucus, and the committees, we are now in a position to follow more easily the several steps in the process of lawmaking.

THE STEPS IN THE MAKING OF A LAW:

1. HOW BILLS ARE INTRODUCED.

In the first place any member of the House may present a bill or resolution. It may be one that he himself has prepared and favors, or it may be one that some outside individual or organization has asked him to introduce. Strictly speaking, there are no "government measures" in either the Senate or the House. Neither the President nor any member of the cabinet can introduce a measure directly, but they can always get some friendly senator or representative to introduce it for them and announce that the administration desires to have the bill passed. In this way measures, all drafted in detail, sometimes come from the White House or from one of the administrative departments. If a congressman desires assistance in drafting a bill, there is a legislative reference service at his disposal, with expert draftsmen attached to it.

[1] There is a further proviso: no member shall be bound by a vote which involves a construing of the Constitution or upon which he made contrary pledges to his constituents prior to his election.

Literally thousands of bills and resolutions are introduced in the early days of each session. Every member of Congress puts in a batch of them, usually in compliance with requests from somewhere. Organizations of every sort, and even individual citizens, ask congressmen to serve them in this way. Ninety per cent of these bills call for the spending of money. Of the rest, the majority call for favors to somebody. They represent an ambition, a grievance, a hope, a cause, or a crusade. It is merely a play upon words to say that bills "originate" in Congress. The real initiative in lawmaking belongs to militant organizations in every corner of the land — organizations of farmers and workers, organizations of manufacturers and merchants, and a multitude of organizations whose main function is to promote this or that novelty in legislation.

WHERE THEY "ORIGINATE."

The procedure in introducing a measure is simplicity itself. The congressman merely writes his name on the bill and places it in a capacious box which reposes expectantly on the clerk's desk. If he feels doubtful about the merits of the measure, he takes care to write "introduced by request" above his name. This relieves him from the responsibilities of fatherhood. The freedom with which bills may be introduced contains both good and bad features. It gives reality to the constitutional right of petition and encourages new legislative ideas. On the other hand, it permits Congress to be swamped with all manner of bizarre proposals which have no chance of ever being adopted, or even of getting to a vote on the floor. Many of these hardy perennials sprout every year, sometimes for a whole generation. Some have merit, but no influential support; some have influential support, but no merit. Only a few hundred bills out of the many thousands have both. And they are the only ones that ever get beyond the initial stages.

THE FLOOD OF BILLS.

Presently, however, all the bills and resolutions are sorted out, given serial numbers, and referred to committees. The "first reading" is supposed to occur when the number and title of the bill or resolution are printed in the *Journal* and the *Congressional Record*. In the case of so-called private bills (see p. 341), the member who introduces the bill indicates the committee which he thinks ought to deal with it. All other bills have their destination decided by the Speaker. If he has any serious doubt as to what committee should receive a particular bill, he may settle the problem by dividing the bill between two committees. Meanwhile the measure is put into printed form at the public expense. If it is a bill which covers a variety of important matters, the committee to which it is referred may assign different parts of it to subcommittees. Committee hearings are

2. REFERENCE OF BILLS TO COMMITTEES.

usually public, but the subsequent discussion by members of the committee is conducted behind closed doors.

3. COMMITTEE HEARINGS.

In any case, the committee or subcommittee will hear all who want to be heard either for or against the bill. This is done as a matter of courtesy, not of constitutional right as many people seem to think; but the opportunity to be heard before a committee is practically never denied to anyone. Each committee has the use of a large room with seats for the public. If many persons desire to appear before the committee, the hearings may last for weeks. Sometimes, when the hearing is on a very important bill, the room is jammed with advocates, opponents, and newspaper men. Lobbyists and paid attorneys may appear and argue for or against the measure, so that the committee room sometimes takes on the atmosphere of a court. The members of the committee ask questions and sometimes enter into argument with the individuals who are addressing it. Occasionally there are sharp passages while the chairman raps loudly for order. Stenographers take down the proceedings so that the committeemen may study the material at their leisure — which they rarely do. Committees sit in the forenoon, because no committee, except the committee on rules, may hold meetings while the House is in session unless it secures special permission. When a hearing is finished, the committee decides, either at once or on a later day, whether it will report the measure to the House.

THEIR VALUE.

Members of the committees get a good deal of information (and misinformation) from these hearings. They can also obtain data in other ways. The Library of Congress is close at hand, with rich material on every subject. Some congressmen spend time in it, looking up information for themselves. Others get the legislative reference service to provide it for them. Many do neither, but trust to their own sagacity in winnowing the wheat from the chaff in what they hear. A committee may also call upon the administrative departments for data and information — upon the department of commerce or the department of agriculture, for example.

THE PRESSURE FROM OUTSIDE.

But information about the merits and defects of a measure is not the only thing that the average congressman wants to obtain. What his own voters think about it is important also, and this cannot be discovered by listening to expert testimony or reading in the library. The congressman's secretary, who opens and reads his telegrams and mail, can give him better information on that point. Sometimes he gets hundreds of these communications in a single day, for the practice of stimulating voters to "write or wire your con-

gressman" has developed to enormous proportions in recent years. Most of these communications, however, are the outcome of activities carried on by self-interested pressure groups. Their identical wording often proves this. Every member of the House soon learns to discount a good deal of what comes to him over the wires or through the mails.

4. WHAT ACTION THE COMMITTEE MAY TAKE.

Several courses are open to a committee with reference to bills which it has under consideration. The committee may report a bill just as it stands. In that case the measure will have a good chance of passing, especially if the report of the committee is unanimous. Or the committee may approve the bill with some amendments of its own. As a third alternative, it may redraft the measure and submit it in greatly altered form. This is frequently done. The committee may even present an entirely new bill, bearing only a slight resemblance to the original. In any event, when a favorable report is made upon any measure, either in its original, revised, or new form, the report goes to the clerk of the House, who enters it upon the *Journal*, and in due course it is set upon one of the calendars for a second reading.[1] Certain committees have the privilege of reporting at any time directly from the floor of the House, although this is not usually done.

THE ASPHYXIATION OF BILLS IN COMMITTEE.

When a committee fails to be impressed by the merits of a measure, it does not go to the trouble of making a report at all. The bill is merely "pigeonholed," that is, supposedly pushed into the discard compartment of the chairman's roll-top desk. That is what happens to most of the measures which a committee receives. Among the many thousands of bills introduced at each session of Congress, the great majority have no chance of ever receiving a place on the House calendars. On the average, a committee reports between 15 and 20 per cent of the bills referred to it;[2] the rest clutter the chairman's desk for a while and are then carted down to the Capitol furnace.

INSTRUCTING A COMMITTEE TO REPORT.

The simplest way to kill any measure, therefore, is to have a committee refrain from reporting it, because no bill can be acted upon by the House until a committee sends it up. It is possible, by a procedure which will presently be explained, for the House to "discharge" a committee — that is, to call up a bill from its hands and act upon it; but this is not done except in rare instances. In a negative sense, therefore, a committee's decision is virtually final.

[1] Nominally the first reading took place when the title of the measure was printed in the *Congressional Record*.

[2] Fifty years ago the percentage ran as high as 30.

Favorable action by a committee does not mean that a bill is assured of passage; but unfavorable action, which is no action at all, becomes a sort of automatic asphyxiation. There is a good deal of complaint about this suffocating process, especially from those whose favorite measures have met a premature demise; but, if any sizable fraction of the bills ever reached the floor of the House, the whole legislative machine would be stymied by congestion.

PROCEDURE IN THE HOUSE: I. THE CALENDARS.

When a measure is reported to the House by a committee, it goes immediately on one of the three calendars. The first of these, known as the union calendar,[1] contains all favorably reported measures relating to revenue, appropriations, and public property. A second, called the house calendar, includes all public bills not included in the foregoing category. For their second reading, all bills on the union calendar go to the committee of the whole house; those on the house calendar are considered by the House itself. The third, known as the calendar of the committee of the whole, or more commonly as the private calendar, makes a place for all measures of a nonpublic character.[2] Private bills come before the House "as in the committee of the whole," the procedure being a compromise between that of the House and that of the committee. There are also two calendars to which public bills may be transferred from union or house calendar: the consent calendar and the discharge calendar.

LAWMAKING BY CONSENT.

The consent calendar affords special facilities to minor noncontroversial bills. On the first and third Mondays of each month the clerk reads the titles of bills which have stood on the calendar for three legislative days. If there is no objection to immediate consideration, a bill is passed without debate, without amendment, and without a second or third reading. If there is objection, the bill remains on the calendar until reached a second time. It now takes objections from at least three members to prevent its being passed. In case of three or more objections, the bill is stricken from the calendar for the rest of the session unless restored by unanimous consent. This consent calendar, as already noted, is a device that was originally adopted as a means of checking the "autocracy" of Speaker Cannon.

[1] Its full title is "calendar of the Committee of the Whole House on the State of the Union."

[2] For example, bills granting pensions to designated individuals, or removing political disabilities, or providing for the survey of individual rivers and harbors. Thus a woman whose automobile was struck by a mail truck on one occasion sought and received compensation amounting to $2,000 by means of a private bill. More recently, President Roosevelt vetoed a private bill which would have given several hundred dollars' reimbursement for time and travel expenses to a woman who, seeking appointment as a nurse in Alaska, journeyed from Scranton to Seattle and there failed to pass the physical examination.

The discharge rule, also originating in 1910, has a similar purpose. It enables the House to take a bill out of the hands of a standing committee and bring it to the floor. A discharge motion requires the signatures of half of the entire House membership and can relate only to a bill which a committee has held for at least thirty days without reporting it. On the second or fourth Monday of the month a discharge motion may be debated for twenty minutes, but only if the bill in question has stood upon the discharge calendar for seven legislative days or more. If the discharge motion carries, the House proceeds at once to consider the bill. But these requirements are rigid and difficult to meet. Consequently, very few bills ever get consideration in this way. Not oftener than once in two years does a discharge motion prevail; only once in four years on the average does the House pass a bill under the discharge rule.

2. CALLING UP BILLS.

Getting bills on the floor by way of the discharge calendar should not be confused with the procedure known as "calling up bills." There are various ways of pushing a bill ahead of its regular place on any of the other calendars. A dozen privileged committees — including the committee on appropriations and on ways and means — have a certain right of way for their bills, although on certain days the regular order of business cannot be displaced except by a two-thirds vote. Special days are set apart for designated classes of measures — the first and third Mondays for the consent calendar and motions to suspend the rules; the second and fourth Mondays for business relating to the District of Columbia and for discharge motions; the first and third Tuesdays for the private calendar; calendar Wednesdays for the call of committees (unprivileged public bills). Resort to suspension of the rules occurs rarely nowadays; for a two-thirds vote is normally difficult to obtain.[1] The consent calendar takes care of minor, non-controversial measures; calendar Wednesday clears a path for unprivileged public bills and special orders from the rules committee. These special orders, for which the backing of a mere majority is sufficient, enable the dominant party to expedite the passage of its chief legislative proposals. The use of special orders, which limit debate and are highly privileged, has grown steadily in the past forty years.[2]

In summary, then, the regular order of daily business in the House is

[1] Suspension of the rules limits debate to 40 minutes and does not permit amendments. The Speaker's power to withhold recognition, although now much restricted, applies fully when members wish to offer motions to suspend the rules.

[2] In the Sixtieth Congress, when Speaker Cannon still controlled the rules committee, only nine special orders were adopted; in the Sixty-sixth, 57; in the Sixty-seventh, 68. The number did not rise above 45 during the next ten years; but, in the first Congress of the Roosevelt administration, it reached 61.

about as follows: first comes the routine opening, with a prayer by the chaplain and the reading of the previous day's *Journal*. Then the House takes up any business that is on the Speaker's table (such as a message from the President, or a bill that has come back from the Senate with amendments), after which it proceeds with unfinished business from the day before.[1] Formerly, after the completion of unfinished business, the "morning hour" began. At every daily session there was a morning hour (it might be an hour or, if no other business pended, a whole afternoon). The standing committees, which the Speaker called in regular order, brought forward bills for consideration. But the morning hour became obsolete after the establishment of calendar Wednesday. Since that time certain days have been preempted for particular kinds of business, as has been explained, and on these days the House takes up the matters in hand, unless diverted therefrom by action which is explained in the next paragraph. Privileged committees take what is left, which is a good deal; and, towards the end of the session, they take almost everything if the majority floor leader and his steering committee think they need it.

THE OPENING PROCEEDINGS.

THE "MORNING HOUR."

The regular order of business is nowadays varied more often than it was fifty or sixty years ago. For although certain days have been set aside for special purposes, the House may, by a two-thirds or unanimous vote or by a special order from the committee on rules, hand over any or all of these days to privileged committees. Indeed it can fairly be said that, towards the end of a session, the regular order of business is now almost wholly disregarded in the general stampede for a place in the front line. Every congressman, in these end-of-the-session days, is working frantically to get his own cherished measures out of the legislative jam. Not all of these projects are worth salvaging; so the House selects the ones that seem to be most deserving, or which have the largest backing among the members, and these it shoves ahead of the rest. "Congress," it has been aptly said, "is a single-track road." [2] Passenger trains (important or urgent bills) get the right of way. There is so much traffic that a lot of perishable freight has to be shunted to the sidings.

SPECIAL DAYS.

Every bill, of whatever sort, is nominally given three "readings." The first reading merely involves the publishing of the bill's title in the

[1] The term "unfinished business," strangely enough, does not include business that was left unfinished in the committee of the whole or on days set aside for special purposes (calendar Wednesday, consent calendar, private calendar, District of Columbia, etc.).

[2] D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), p. 222.

Journal and *Congressional Record*. The second reading of public bills which raise revenue or make appropriations of money takes place in the committee of the whole; of other public bills, in the House; and of private bills, in the House "as in committee of the whole" (this involving, as has been explained, a hybrid procedure). At the second reading amendments may be offered. In fact, the real discussion of the bill, aside from its preliminary consideration by a standing committee, takes place at its second reading. When the committee of the whole has finished with a money bill, it reports back to the House. Thereafter the proceedings are usually of a formal nature. The Speaker says: "The question is on engrossment and third reading of the bill as amended." [1] Then the *Congressional Record*, in its next issue, announces that the bill was ordered to be engrossed and read a third time, was read the third time, and passed.[2] As a matter of fact it is not read a third time, except by title, unless some member (perhaps for purposes of obstruction) requests that it be read in full. When a bill is strongly opposed, however, the question of ordering engrossment and third reading may involve further debate and additional amendments with roll calls on each of these amendments and at the time of final passage. But when bills are considered under suspension of the rules, no amendments are in order. And when they are being considered under special orders from the committee on rules, permissible amendments are often limited to those enumerated and described in the orders. After final passage by the House all bills are signed by the Speaker, and transmitted to the Senate for concurrence.

3. THE THREE READINGS.

Four methods of voting are used in the House of Representatives. The most common method is the viva voce vote. The Speaker says, first, "As many as are in favor say 'Aye' "; and then, "As many as are opposed say 'No.' " The result may be inconclusive. On one notable occasion Speaker Cannon ruled that, although the Ayes made obviously more noise, the Noes had it. In case of doubt any member may demand a rising vote, technically known as a

HOW VOTES ARE TAKEN.

[1] Engrossment means the typing of the bill exactly in the form that has been given to it before third reading and final passage.

[2] Senators pride themselves on being more leisurely and deliberate. They were shocked when Vice-President Garner imported practices that had grown familiar to him as Speaker of the House. In swiftly tumbling words (according to an Associated Press report of April 1, 1933) he announced: "The question is, Shall the bill be engrossed, read the third time, and passed? There being no objection, the bill is passed." Or, in another case, "Without objection the committee amendment will be agreed to, and, without objection, the bill as amended will be considered ordered engrossed for a third reading, read a third time, and passed." On this occasion the Democratic floor leader demanded a reconsideration of the vote in order to have the purpose and content of the bill explained. The explanation lasted several hours without resulting in any amendment.

division. First those in favor rise to be counted; then those opposed. The Speaker thereupon declares the count and his announcement cannot be disputed or appealed. But one fifth of a quorum may demand the appointment of two tellers, one from each side of the question; and these tellers count the vote as the Ayes and Noes successively pass between them at the head of the center aisle.

Finally, the Constitution provides that, if one fifth of the members present ask for it, the Yeas and Nays shall be recorded. A roll call must always take place, likewise, when the passing of any measure over the President's veto is being decided. If a member expects to be absent at the time when the vote is to be taken, he pairs off with some member on the other side who also expects to be absent. This "pairing" is arranged by notifying the clerk. The pairs are published in the *Congressional Record* immediately after the announcement of a yea-and-nay roll call.

When the House has finished with a measure and transmitted it to the Senate, what does the latter body do with it? It may do any one of four things: it may pass the measure without change, pass it in amended form, reject it outright, or let it die at the hands of a Senate committee. Senate committees, like those of the House, have the privilege of pigeonholing all measures which they do not like. More often, however, the measure will pass the Senate after having been amended, in which case it must come back to the House for a vote of acceptance of such amendments. If the House accepts them, well and good; but if it declines to do so, the matter goes to a conference committee as has already been explained.[1] No bill or resolution can become a law unless both Houses have concurred upon every word of it.

BILLS SENT TO THE SENATE FOR CONCURRENCE.

Finally, when a bill has passed its various stages in both chambers, it is laid before the President for his approval or veto. If signed by the President, or if allowed by the efflux of ten days to become a law without his signature (as the Constitution provides), it goes to the archives of the state department and in due course is published in the statute book of the nation. That, in brief, is the biography of a law. On the way to its destination, there are hills to be climbed and streams to be forded, so that among the myriad bills that start their journey, it is only the most robust that survive to the end.

THE FINAL STEPS IN CONGRESSIONAL LEGISLATION.

The House of Representatives was created in conscious imitation of the House of Commons, and it still bears, in many respects, the imprint of its paternity. Look down from the gallery and you will notice, standing

[1] See p. 333.

in a marble pedestal beside the Speaker, a gilded staff surmounted by an eagle. When the House adjourns, you will note that the sergeant-at-arms takes this staff from its place and carries it out. When the House resumes, he brings it back. When he is commanded by the Speaker to restore order, he shoulders this mace (as it is called), for it is his symbol of authority. But how many congressmen know that the mace, and all the ritual pertaining to it, developed in England long before America was discovered? There, it was originally a symbol of the royal presence in the House of Commons while the king presided in person at sessions of the House of Lords. The mace at Westminster with its gilded crown, and the mace at Washington with its gilded eagle — they are kinsfolk across the seas.

A CHILD OF THE "MOTHER OF PARLIAMENTS."

REFERENCES

In addition to the references at the close of the previous two chapters, attention is called to the following works on legislative procedure: Joseph P. Chamberlain, *Legislative Processes; National and State* (New York, 1936), Harvey Walker, *Lawmaking in the United States* (New York, 1934), F. M. Riddick, *Congressional Procedure* (Boston, 1941), Clarence G. Dill, *How Congress Makes Laws* (2nd edition, Washington, 1939), and John Q. Tilson, *Parliamentary Law and Procedure* (Washington, 1935). The effect of party discipline on procedure is covered in such works as P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927), George R. Brown, *The Leadership of Congress* (Indianapolis, 1922), and Roland Young, *This is Congress* (New York, 1943).

LOBBYING. The activities of lobbyists and pressure groups are fully described in E. P. Herring, *Group Representation before Congress* (Baltimore, 1929), Peter H. Odegard, *Pressure Politics* (New York, 1928), and K. C. Crawford, *The Pressure Boys; the Inside Story of Lobbying in America* (New York, 1939). The entire issue of the *Annals of the American Academy of Political and Social Science* for July, 1929 (CXLIV) is devoted to articles on the subject of lobbying.

The *House Manual and Digest* and the *Manual of the United States Senate* contain the formal rules of procedure of the two chambers. Decisions on parliamentary law built up in the House of Representatives over the years by various Speakers and committee chairmen can be found in Asher C. Hinds, *Parliamentary Precedents of the House of Representatives* (5 vols., Washington, 1907), and supplementary volumes prepared in 1919 and 1935 by Clarence Cannon. The 1935 supplement, in three volumes, is entitled *Cannon's Precedents of the House of Representatives of the United States.*

CHAPTER XXII

THE GENERAL POWERS OF CONGRESS

The basis of our political system is the right of the people to make and to alter their constitutions; but the constitution which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory on all. — *Washington.*

The Senate and the House of Representatives together constitute the national legislature or Congress of the United States. Before attempting to explain what this combined body does, or can do, in the way of raising and spending money, regulating commerce, promoting agriculture, providing for the national defense, etc., it is desirable to present a general view of congressional powers as a whole — their nature and source, their scope and limitations, as well as the direction in which they have been moving during recent years.

CONGRESSIONAL POWERS.

Congress is commonly spoken of as the lawmaking branch of the national government, but it is a good deal more than that. Broadly regarded, it is the instrument by which the people frame, declare, and supervise the policies of the nation. It not only lays down the law but conducts investigations to find out what the law ought to be and whether it is being properly administered. It may even punish for contempt any person who refuses to give information during these investigations.[1] Thus it possesses a quasi-judicial power. It may, by action on the part of both its Houses, impeach and remove any civil officer of the United States. It may initiate proposals to amend the Constitution. It canvasses the electoral votes every four years; and under certain circumstances, as already explained, its individual Houses may choose the President and Vice-President. Finally, it declares war — by joint resolution, not by statute. It does many things other than the making of laws.

MORE THAN A LAWMAKING BODY.

[1] McGrain *v.* Daugherty, 273 U. S. 135 (1927). See also M. E. Dimock, *Congressional Investigating Committees* (Baltimore, 1929); E. J. Eberling, *Congressional Investigations* (New York, 1928); and M. N. McGeary, *The Development of Congressional Investigative Power* (New York, 1940). In the *American Political Science Review*, Vol. XXXI (1937), pp. 680–685, appears an article by the last-named author on investigations occurring in the first term of President F. D. Roosevelt.

Nevertheless, with all its vast endowment, the authority of Congress is in no sense an unlimited power. Unlimited power cannot be exercised by any branch of the American federal government — executive, legislative, or judicial — or even by all three acting together. There are more limitations than in any other country, and the greatest of these limitations upon the powers of Congress arises from the theory of the Constitution itself.

THE POWERS OF CONGRESS ARE DELEGATED POWERS.

The Constitution of the United States, as has been already shown, is a grant or delegation of powers. In that respect it differs from the constitutions of the several states, for in the states all powers exist as a result of the states' original sovereignty. By the national Constitution, Congress gets only what is therein given; by the state constitutions every state legislature gets whatever is not taken away. This difference is of vital importance, so vital that it can scarcely be overemphasized. The national Constitution is the source of all the authority possessed by Congress.

ARE THERE "INHERENT" POWERS OF INTERNATIONAL SOVEREIGNTY?

Occasionally it has been argued that, since the United States is a sovereign nation in its dealings with other countries, its legislative body (Congress) must have all the powers which go with international sovereignty whether they are conferred by the Constitution or not.[1] Among such powers are the right to acquire new territory, to set up consular courts in foreign countries, and to restrict immigration. But nearly all the authority which a sovereign nation would commonly exercise in its dealings with other countries is already given to Congress by the power to regulate foreign commerce and the other broad powers which the Constitution lodges in the federal government.

THE TWILIGHT ZONE OF AUTHORITY.

From time to time, likewise, the theory has been advanced that, since there is a no-man's land intervening between the jurisdiction of the states and that of the federal government, the latter is entitled to take possession of this area. In other words, whenever there is a problem which would ordinarily fall into the residual category of state powers, but which is in fact beyond the active power of a state to handle — in such cases, the national government should be permitted to deal with the problem. President Theodore Roosevelt argued for such a doctrine in one of his books.[2] Other writers, within the past few years, have gone so far as to

[1] See W. W. Willoughby, *The Constitutional Law of the United States* (2nd edition, 3 vols., New York, 1929), Vol. I, p. 90.

[2] *The New Nationalism* (New York, 1910).

contend that Congress has power to do anything which the "general welfare" may require.[1]

MADISON ON THE GENERAL WELFARE CLAUSE.

A word of comment on this general welfare clause seems desirable. Apparently it was not originally intended to enlarge the powers of Congress, but to limit the purposes for which Congress might levy taxes. James Madison took that position, and he knew as much as any man about what the framers of the Constitution intended. He wrote: "The enemies of the new Constitution in their anxiety to prevent its adoption were professing to find in the above-quoted clause 'an unlimited commission to exercise any power which may be alleged to be necessary for the common defense or general welfare.' "[2] But, as Madison pointed out, there would be no reason for enumerating a long list of specific powers in the Constitution (Art. I, Sec. 8) if Congress had such a comprehensive power to provide for the general welfare. The latter would surely include all the specific powers given to Congress and many more besides. It may be mentioned, moreover, that the expression "common defense and general welfare" was copied from the Articles of Confederation which provided that "all charges for war and all other expenses that shall be incurred for the common defense and general welfare . . . shall be defrayed out of the common treasury." Yet no one ever suggested that the congress of the confederation obtained from this provision any comprehensive powers of general welfare promotion.

WHAT IS A "GENERAL WELFARE" PURPOSE?

The question as to what is a general welfare purpose has often been presented to the courts for interpretation. May taxes be imposed to pay bounties to growers of sugar beets or some other commodity which Congress desires to encourage? May Congress raise money by taxation to construct irrigation works in a single state, or help a city celebrate its centennial, or assist some section of the country that happens to have a crop failure? In such matters the courts have held that incidental private benefits or sectional advantages do not preclude the main purpose from being a general welfare purpose. On the other hand, the Supreme Court held in 1936 that the processing taxes which were levied by Congress in the Agricultural Adjustment Act (1933) were unconstitutional.[3] One weakness of these processing taxes from a constitutional standpoint (but not the

[1] James F. Lawson, *The General Welfare Clause* (Washington, 1934). The "general welfare" clause appears at the beginning of Section 8, Article I, of the Constitution. It reads: "The Congress shall have power to lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

[2] *The Federalist*, No. 41.

[3] U. S. *v.* Butler, 297 U. S. 1 (1936).

only one) was that the proceeds from these taxes were not to be merged with the general revenues and then expended for any general welfare purpose which Congress might determine, but were definitely earmarked for payment without special appropriation to those farmers who would restrict their agricultural production and thus reduce a temporary surplus of farm products. Too much importance should not be attached to this decision, since it did not imply that a tax imposed by Congress, as a means of augmenting its general revenues, would be declared unconstitutional because the proceeds were thereafter appropriated by it for the benefit of agriculturists alone.

The majority decision (6 to 3) declared:

> The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. . . . The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for the payment of the nation's debts and making provision for the general welfare.

But according to the minority:

> As the present depressed state of agriculture is nationwide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes "to provide for . . . the general welfare."

The next year (1937), however, the Court sustained the constitutionality of the Social Security Act by a bare majority, which included the three dissenters of the previous year.[1] Mr. Justice Cardozo, in delivering the opinion of the Court, had this to say about the controversial clause:

> It is too late today for the argument to be heard with tolerance that, in a crisis so extreme, the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.

This reversal on the part of the Supreme Court did not evoke any widespread protest from the states, yet one can hardly escape the conclusion that if the dictum of Justice Cardozo is maintained — "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states" — then there will be an almost unlimited opportunity for invasion of the reserved rights of the states.

With respect to the various other powers which the Constitution confers on Congress, two historic questions have arisen. The first was

[1] Steward Machine Company *v.* Davis, 301 U. S. 548 (1937), and Helvering *v.* Davis, 301 U. S. 619 (1937).

this: could the grant of authority to the federal government be revoked? The several states, it was admitted, gave Congress certain powers in 1787. Could these individual states resume any of the powers which they had bestowed at that time? In other words, could a state nullify any power which was given to Congress by the Constitution? The second issue concerned itself with whether a state could resume all its original powers by seceding from the Union. Nullification and secession, in other words, were tense political issues in American history many years ago, but both of them have long since been settled by the march of events.

TWO HISTORIC ISSUES:

South Carolina in 1832 made her famous gesture of nullification based upon the contention that, whenever Congress went beyond the limits of power which appeared to have been granted by the Constitution, any state was at liberty to declare such action unauthorized and null.[1] This doctrine found its advocate in John C. Calhoun.[2] According to his interpretation of the Constitution, the states could refuse to obey any federal law which they deemed to be unconstitutional. Acting upon this conception of ultimate state sovereignty, South Carolina in 1832 attempted to nullify certain tariff laws which Congress had passed. But the attempt did not succeed. The federal government, under President Andrew Jackson's leadership, took up the gage of battle and persuaded South Carolina to recede from her position of defiance.

1. NULLIFICATION.

The question of whether a state had the right, not merely to refuse obedience to acts of Congress, but to withdraw from the Union altogether, and thus to repudiate the compact of 1787, came to the front in a much more serious form twenty-eight years later. Threats of secession had been made by various states from time to time during the first half of the nineteenth century, but it was not until December 20, 1860, that any

2. SECESSION — A FAR MORE DIFFICULT PROBLEM.

[1] A somewhat different doctrine of nullification had been put forward by Madison and Jefferson in the famous "Virginia and Kentucky Resolutions" as a protest against the Alien and Sedition Acts of 1798. According to the Kentucky resolutions (second act), a nullification, by the sovereign states, of all unauthorized acts done under pretended constitutional power "is the rightful remedy"; and, according to the Virginia resolutions, the states, as parties to the compact of 1787, "have the right, and are in duty bound, to interpose for arresting the progress of the evil" when the federal government exceeds its powers.

[2] Calhoun's doctrine may be summarized into four propositions: 1. The Union is a compact of equal states. 2. The federal government was created by the states as their agent to carry out the terms of this compact as embodied in the Constitution. 3. The act of an agent, if beyond the scope of its authority, is null and void. 4. Each state has the right to decide for itself whether an act of the federal government is beyond the scope of its powers. For a full statement of the doctrine see his *State Papers on Nullification* (1834), also David F. Houston's *Critical Study of Nullification in South Carolina* (New York, 1896).

state took the actual step of seceding. On that date South Carolina once again assumed the initiative by declaring that "the union now subsisting between South Carolina and other states under the name of the United States of America is hereby dissolved." Within a few months ten other southern states had taken similar action.

CLAIMS OF THE SECESSIONISTS.

The right to secede from the Union, and thus reacquire all the powers which had been surrendered by the states to Congress in 1787, was based upon several contentions which need not be enumerated here. They may be epitomized in the old claim that the Constitution was nothing more than a treaty or compact among the states, and that the violation of its terms or spirit by some of the states freed the others from the obligation of being further bound by it.[1] Daniel Webster and others replied that the Constitution was not a compact among the states but an agreement among the people. They pointed to the very first words of the Constitution, "We, the people of the United States . . . do ordain and establish this Constitution." The southern statesmen retorted by pointing to the very last words of the Constitution which provided for the establishment of the Constitution "between the states so ratifying the same."

AND THE OUTCOME OF THESE CLAIMS.

During the years preceding the Civil War the question was argued from every angle and with all manner of legal ingenuity. Both sides appealed to history, and distorted history, to support their respective contentions. As for the Constitution itself, it was found to be as mute as a dying gangster on the question of whether the states could withdraw from the Union after once entering it. Nothing was said about that matter in the convention of 1787, and naturally so, for the framers of the Constitution were not worrying about how to let the states out of the Union, but how to get them in. Along with many other far-off issues they left this one for posterity to handle, if it should ever arise. And eventually it did arise. Men argued bitterly about it in Congress, waged four years of fratricidal warfare over it, and finally settled the issue at Appomattox.

PERPETUAL NATURE OF THE UNION ESTABLISHED.

Blood and iron gave their verdict in 1865. Since the day that Lee offered his sword to Grant, this stormy petrel of American politics has been at rest. No state has the right to take back any of the powers or functions which it agreed to give to the national government by the compact of 1787. These powers form the permanent endowment of Congress. They can be with-

[1] Jefferson Davis, President of the Confederacy, in his message to the Congress of the Confederate States (April 29, 1861) gave a full statement of the secessionist doctrine. This is elaborated in his *Rise and Fall of the Confederate Government* (2 vols., New York, 1881), Vol. I, pp. 1–258.

drawn in one way only — that is, by the concurrence of three fourths of the states as provided in the Constitution.

Three points, accordingly, are now well established in American constitutional jurisprudence. First, the Constitution is a grant of powers, and Congress has no lawmaking authority save as is therein conveyed. Second, within its own sphere, as delimited by the Constitution, the authority of Congress is supreme. Third, no state has any right to nullify this supremacy by a refusal to recognize it, nor may individual states secede from the jurisdiction of the federal government. As Chief Justice Marshall phrased it in one of his great decisions:[1]

SUMMARY OF THE CONSTITUTIONAL BASES OF CONGRESSIONAL POWERS.

> The government of the Union is acknowledged by all to be one of enumerated powers. But it is emphatically and truly a government of the people, in force and substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit. The people did not design to make their government dependent on the states. Therefore, the government of the Union, though limited in its powers, is supreme within its sphere of action. Its laws, when made in pursuance of the Constitution, form the supreme law of the land. It is the government of all that acts for all.

But although the powers of Congress, as Marshall says, are limited to those enumerated in the Constitution, this does not mean that no new powers can be added. Additional authority can be given to Congress by constitutional amendment; and on more than one occasion this has been done. A noteworthy example was afforded by the sixteenth amendment (1913), which widened the taxing power of the national government. Moreover, as has already been pointed out, the powers of Congress have been steadily widened by the process of judicial interpretation. A government of enumerated powers is not by any means a government of static powers.

THE EXPANSION OF FEDERAL AUTHORITY.

This is what sometimes happens: Public sentiment begins by desiring some action which cannot be satisfactorily taken by the legislatures of the states; then it demands action by Congress, although realizing that Congress has no clear constitutional power so to act. Congress, in turn, yields to the pressure and takes the action, leaving the question of constitutionality to the Supreme Court. If the Court feels that the popular demand is not merely capricious and transitory, but more or less mature and persistent, and especially if it sees that a refusal to support the action of Congress would involve it in serious controversy or loss of prestige, it may decide to "reinterpret" the meaning of words or phrases in the Constitution. It may find a knothole, as Mr. Justice Harlan once said,

[1] McCulloch *v.* Maryland, 4 Wheaton 316 (1819).

big enough to push the doubtful measure through. The "general welfare" clause may well become such a knothole.

Again why did the Supreme Court hold the National Labor Relations Act constitutional? Many of the employees brought under this act were not engaged in interstate commerce. But the manufacturers who employed them were; for they bought raw materials from other states and shipped finished goods to other states. Conflicts between employers and workers in one state, moreover, would affect production in other states, and thus obstruct the flow of interstate commerce.[1] Or, to take another illustration: after two federal child-labor laws had been invalidated by the Court, and after the states had failed to ratify a child-labor amendment to the Constitution, Congress accomplished the same purpose by passing, in 1938, the Fair Labor Standards (Wages and Hours) Act. Unanimously the Court upheld the act.[2]

When Congress possesses a power, must it exercise this power directly or can it delegate the authority to someone else? Having the power to levy taxes, for example, can Congress turn over to the secretary of the treasury, or to a tax board, the function of determining what shall be taxed and at what rates? The answer is in the negative. Powers granted to Congress by the Constitution cannot be farmed out, but must be exercised directly. The *substance* of power may not be delegated. On the other hand, it is obvious that Congress cannot be expected to embody in statutory form all the minor regulations which are needed in connection with the administration of the laws. Hence it is allowable to authorize some executive officer (usually the President, or the head of a department, or a national board, such as the interstate commerce commission) to make these detailed rules. Congress lays down the general provisions by statute, but within the scope of these provisions it may give discretionary power to some federal officer or board. And this discretionary power may be of far-reaching scope, as has been demonstrated within the past few years.[3]

CAN CONGRESS DELEGATE ITS POWERS TO EXECUTIVE OFFICERS?

This principle that the substance of legislative power must not be delegated was vigorously reaffirmed by the Supreme Court in the Schechter Case (1935). The National Industrial Recovery Act of 1933 conferred upon the President extensive authority to approve or reject codes of fair competition prepared by industries and submitted to him. Congress, in passing this important

THE SCHECHTER CASE.

[1] N L R B *v.* Jones and Laughlin Steel Corporation, 301 U. S. 1 (1937).
[2] United States *v.* Darby Lumber Company, 312 U. S. 100 (1941).
[3] See pp. 525–527.

statute, did not set up any adequate standards whereby codes should be approved or rejected by the President, but left the ultimate decision to his executive judgment. The Supreme Court held that the act involved a delegation of legislative power by Congress and for that reason was unconstitutional. The Court also held the act to be unconstitutional for another reason: namely, because it attempted to control industries which were not engaged in interstate commerce.[1]

CAN IT DELEGATE ITS POWERS TO THE STATES OR TO THE VOTERS?

Some other questions arise concerning the delegation of legislative power. Can Congress turn over any of its powers to the states? Can it submit laws to a referendum or vote of the people, as is done in some of the states? The answer is No in both cases. Power to grant patents, or to establish post offices, or to fix the standards of weights and measures (all of which powers are vested in Congress by the Constitution) cannot be turned over or formally delegated to the state legislatures. On the other hand, without any formal delegation, the national government may permit the state legislatures to exercise certain powers (not prohibited to the states by the Constitution) until such time as Congress proceeds to assume these powers. Some illustrations of this will be given presently.[2] Nor is it permissible for Congress to hold a national referendum on the adoption or rejection of any measure. But there is nothing to debar Congress from authorizing an advisory popular vote to ascertain the wishes of the people (on the question of declaring war, for example) so long as it reserves to itself the final decision and action.

THE CLASSIFICATION OF THE POWERS OF CONGRESS.

Having thus seen the constitutional basis of its authority and the scope of its exercise, let us turn to the actual powers of Congress. These may be classified in various ways. One method of classification is according to the form in which they are granted, whether in express terms or by implication. Another is according to the degree of obligation imposed, in other words, whether they are permissive or mandatory. A third distinction relates to exclusive and concurrent powers. Finally, and most significant of all, is the classification of the powers of Congress according to their nature and importance.

EXPRESS AND IMPLIED POWERS.

Does Congress possess only those powers which are granted by the Constitution in express terms? Or does Congress also possess powers which, though not expressly granted, may be reasonably implied? The Constitution, for example, expressly gives Congress the right to borrow money. Does that express power carry with it the implied right to issue bonds, to

[1] See p. 70, footnote 2, and pp. 445–446. [2] See p. 358.

employ bond salesmen, and even to establish banks in order to facilitate the exercise of the borrowing power? This question arose at a very early date. Hamilton and the Federalists argued that there ought to be no strict construction of the Constitution's terse phraseology, no reading of the words with a microscope and a dictionary. They contended that, wherever an express power had been granted, this express grant should be construed to carry with it whatever implied powers were "necessary and proper" to make the will of Congress effective.[1]

HAMILTON'S VIEW.

Jefferson and the Anti-Federalists took the opposite ground, maintaining that the long enumeration of express powers granted to Congress in the Constitution was meant to be complete, and that other powers should not be added by implication. They argued that if this implied-powers doctrine were allowed to prevail, there would be no end to the expansion of the federal government's authority. Congress might assume all sorts of things to be "necessary and proper" for doing its work. The preservation of states' rights, they felt, made it essential that Congress be kept to a strict and literal interpretation of its delegated authority.

JEFFERSON'S VIEW.

Between these divergent views, the Supreme Court, in a most notable decision, took a stand which upheld the Federalist claim. "The sound construction of the Constitution," said Chief Justice Marshall in this decision, "must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people." A narrow construction, he declared, would hamper the operations of government and make it incapable of performing the functions that it was established to perform. Then Marshall drove home the Court's decision in these forceful words:[2]

THE SUPREME COURT'S DECISION.

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but consist with the letter and the spirit of the Constitution, are constitutional.

An express power, in short, may be carried beyond its own phraseology. The doctrine of implied powers was thus given recognition in 1819, and it has ever since been a well-established rule or principle of American constitutional interpretation.

[1] See Art. I, Sec. 8, par. 12 of the Constitution.
[2] McCulloch *v.* Maryland, 4 Wheaton 316 (1819).

Some of the most important functions which the federal government performs today have their basis in "implied" powers. The right of Congress to provide for the establishment and supervision of national banks, federal reserve banks, and various other banking or credit institutions, is not an express power, for the Constitution contains no mention of banks or banking. The power is implied, or at any rate has been held by the Supreme Court to be implied, in the express power to borrow money on the credit of the United States. The right of Congress to regulate the food and fuel consumption of the country or even to take over industries in times of national emergency is nowhere expressly granted in the Constitution. It is clearly implied, however, in the express power "to raise and support armies." If it is necessary to commandeer an aircraft factory to "support" the armed forces, Congress has the power to do it.[1]

SCOPE OF THE "IMPLIED" POWERS.

Nor, again, does the Constitution expressly give Congress the right to regulate the stock exchanges, or the issue of securities, yet this authority is implied in the power to regulate commerce among the several states. The power to establish carries with it the power to maintain; the power to regulate implies the power to create agencies of regulation; the power to do a thing implies the right to choose the means of doing it. Bear in mind, however, that Congress is not the judge of its own implied powers. The Supreme Court is the final arbiter in such matters and, on several occasions, it has denied congressional claims to implied authority.[2]

The powers granted to Congress by the Constitution are mostly permissive in character: that is to say, Congress may or may not exercise them, as it sees fit. It may use these permissive powers much, little, or not at all. The clause which provides that Congress shall have power "to borrow money on the credit of the United States" obviously does not mean that Congress shall go out and borrow money whether the country is in need of it or not. Thus it is with the power "to grant letters of marque and reprisal." It has granted none during the past eighty years.

MANDATORY AND PERMISSIVE POWERS.

On the other hand, there are some powers which, notwithstanding their permissive phraseology, are mandatory in effect. Whenever, for example, some action on the part of Congress is necessary to make a pro-

[1] Many other illustrations might be given; for, as Professor J. M. Mathews has said (*The American Constitutional System*, 2nd edition, New York, 1940), the implied powers of Congress are more numerous and more extensive than its express powers. One might ask where Congress got the power to punish theft of the mails and to establish the parcel post, or to provide for unemployment compensation and old-age pensions, or to pass pure food and drug acts. In some instances, an implied power is derived from an express power, not directly, but at second hand, one implied power having given birth to another.

[2] For examples, see pp. 400–401.

vision of the Constitution effective, it can hardly be argued that the function of Congress is a discretionary one. To give an illustration: the Constitution provides that the Supreme Court shall have appellate jurisdiction "under such regulations as Congress shall make." But if Congress should establish no regulations, the court would then have no appellate jurisdiction and the entire judicial system would be in chaos. Obviously the words of the Constitution on this point, although they seem permissive, are, in fact, mandatory.

PHRASEOLOGY IS SOMETIMES MISLEADING ON THIS POINT.

Again, the Constitution provides for a reapportionment of seats in the House of Representatives after every decennial census, this census to be taken in such manner "as Congress shall by law direct." But if Congress fails to provide the machinery and the money for taking the census, the reapportionment prescribed by the Constitution cannot be made. Congress is, therefore, under obligation to provide for the taking of a census, even though the Constitution does not specifically require it to do so. On the other hand, if Congress fails to have a census taken, or neglects to provide for a reapportionment of seats after a census, as it did after the census of 1920, there is no way of applying compulsion. The Supreme Court will not order Congress to vote money or to pass a law; for, if the Court were to issue such an order, there would be no way of enforcing it. It could hardly put Congress in prison for contempt.

Then there is the distinction between exclusive and concurrent powers. A power is exclusive, as in the case of coining money or declaring war, when the Constitution has granted it to Congress and also denied it to the states; otherwise it is concurrent. The states have concurrent power to "fix the standard of weights and measures" and even to regulate some phases of interstate and foreign commerce (mainly for the protection of public health and safety.) [1] But frequently the power is of such a nature that, when Congress has acted, no room is left for any competing or supplementary legislation. Congress has power to enact laws relating to bankruptcy, but except for three brief periods, bankruptcy was left altogether to the states until 1898. A federal statute of that year, however, occupied the field so completely that the earlier state laws had to be repealed or suspended; for whenever a conflict arises in matters of concurrent power, the state laws give way to the federal laws. Another illustration: the Constitution gives Congress power to "establish a uniform rule of naturalization," but not until 1817 did the Supreme Court, abandoning its earlier posi-

EXCLUSIVE AND CONCURRENT POWERS.

[1] Cooley *v.* Board of Port Wardens, 12 Howard 299 (1851); Kelly *v.* Washington *ex. rel.* Foss Company, 302 U. S. 1 (1937).

tion, hold this power to be an exclusive, rather than a concurrent, power.[1] Concurrent powers, though as a general rule merely implied, may be conferred by the Constitution upon both Congress and the states in express terms. For example, the eighteenth amendment, which was repealed in 1933, entrusted its enforcement to Congress and the several states concurrently.

Broadly speaking, all legislative powers are divided by the Constitution into four groups: First, there are certain powers which are forbidden to be exercised, either by Congress or by the states. Second, there are various powers vested in Congress alone, to the exclusion of all state authority. Third, there are a few concurrent powers, which Congress and the state authorities share. And finally, there are all the remaining powers of government forming a residuum which reverts to the states.[2]

THE FOUR GROUPS OF POWERS PROVIDED FOR IN THE CONSTITUTION:

The powers prohibited either to Congress, or to the states, or to both, possess a considerable range. Some are powers which no free government should ever exercise: for example, the power to pass bills of attainder, or to enact ex post facto laws, or to deprive anyone of his life, liberty or property, without due process of law. The exercise of these powers is forbidden to both the national and the state governments.

1. POWERS PROHIBITED TO BOTH THE NATION AND THE STATES.

But, in addition, there are other powers, not by their nature despotic or arbitrary, which had to be vested in some central authority and hence were prohibited to the states, so that they might always be exercised by Congress alone. The states, accordingly, were forbidden to make treaties, to coin money, or to lay taxes on either exports or imports.

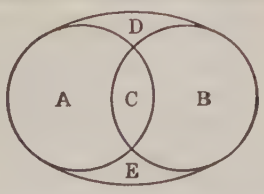
2. POWERS PROHIBITED TO THE STATES ONLY.

The Constitution contains eighteen clauses expressly granting powers to the national government, hence the customary reference to "the eighteen powers of Congress." There are really more than eighteen powers, however, because some of the clauses convey more than one. The section which contains the enumer-

3. POWERS GIVEN TO CONGRESS.

[1] Chirac *v.* Chirac, 2 Wheaton 259.

[2] The division may be made somewhat clearer perhaps by the following diagram:



Let the ellipse represent the totality of governmental powers. Then Circle A includes all powers granted to the national government, Circle B all powers reserved to the states; Seg-

ation of these powers is the longest single section in the Constitution and also the most important.[1] It furnishes the national government with its

ment C, the few powers which are concurrent powers, i.e., exercisable by both federal and state governments; Segment D, powers prohibited to the nation; and Segment E, powers forbidden to the states. The following are some of the more important powers that would be placed within the aforementioned circles and segments:

National Powers	Concurrent Powers	Prohibitions upon the Nation	Prohibitions upon the States	State Powers
To conduct foreign affairs. To raise and support armies. To maintain a navy. To regulate foreign and interstate commerce. To coin money. To establish a postal service. To grant patents and copyrights. To admit new states.	To tax. To borrow money. To charter banks and other corporations. To promote agriculture. To foster education.	To abridge freedom of worship or of the press or of assembly or of petition. To deny any of the other privileges enumerated in the Bill of Rights (see Amendments I–X). To permit slavery in any territory within the national jurisdiction. To abridge the suffrage of citizens on account of sex. To give preference to one state over another in matters of commerce.	To keep troops or ships of war in time of peace. To enter into any treaty. To coin money or issue bills of credit. To pass any law impairing the obligation of contracts. To lay any tax or duty on imports. To abridge the privileges or immunities of citizens of the United States, or deprive them of life, liberty or property without due process of law or deny to persons within their jurisdiction the equal protection of the laws. To abridge the voting rights of citizens on account of race, color, previous condition of servitude, or sex.	To make and enforce the ordinary civil and criminal laws. To establish and control local government. To conduct elections. To regulate commerce and industry within the state. To protect the life, health, and morals of the people (the "police power").
		To pass any bill of attainder or ex post facto law. To grant titles of nobility. To levy duties on exports.		

[1] Article I, Section 8. But many — more than a dozen — of the powers of Congress are to be found elsewhere in the Constitution: for example, the power to override the veto, admit new states, make all needful rules and regulations respecting the territory and other property of the United States, etc.

motive power, and, indeed, without this particular section Congress would be a body of very little consequence. This section gives momentum to the whole national mechanism.

HOW THESE POWERS MAY BE CLASSIFIED.

Taken as a whole, the legislative powers granted to Congress in these eighteen clauses of the Constitution may be grouped under eight headings: 1. *Financial*, the power to levy taxes, to vote appropriations, and to borrow money. 2. *Commercial*, the power to regulate foreign and interstate commerce. 3. *Military*, the power to declare war; to raise and support armies; to provide for the organization, arming, and calling forth of the militia; to maintain a navy; and to make rules for the government of the land forces. 4. *Monetary*, the power to coin money, to regulate the value thereof, and to protect the currency against counterfeiting. 5. *Postal*, the power to establish post offices and post roads. 6. *Judicial*, the power to establish inferior courts and to determine the composition and appellate jurisdiction of the Supreme Court. 7. *Miscellaneous*, including powers in relation to naturalization, bankruptcy, patents, copyrights, and the government of the District of Columbia and other places (such as navy yards) purchased with the consent of the states. 8. *Supplementary*, the power to make all laws which may be found "necessary and proper for carrying into execution the foregoing powers."

Not all of these powers are of equal scope and importance. The first three categories — financial, commercial, and military — are of greater significance than all the others put together.[1]

4. POWERS WHICH REMAIN WITH THE STATES.

Naturally enough, no enumeration of powers retained by the states is made in the Constitution. There was no need for it; the states merely retained all that they did not give away. When an individual gives a deed of certain properties, he does not think it necessary to accompany this grant with a list of all the properties that he retains. Thus powers not conveyed by the Constitution to Congress, and not prohibited to the states, are state powers. The residuum of powers which remains with the states is very large, including nearly the whole field of civil and criminal law, the chartering of corporations, the supervision of local government, the maintenance of order, the control of education, and the general administration of many things which touch the daily life of the people.

Congress is popularly said to be the nation's lawmaking body. As such it enacts laws within the scope of its constitutional powers. But Congress is also, in a very real sense, an administrative body: it controls and directs the whole work of administering and enforcing its own laws.

[1] They are dealt with in Chapters XXIII, XXIV, XXV, and XXX of this book.

Congress provides the money without which the laws could not be executed or justice administered. It determines the pay of everybody in the service of the federal government. When Congress makes an appropriation of money to buy land and build a post-office building, for example, the appropriation is made in the form of a law; but the action is to all intents a business deal, and the ordinary citizen looks upon it as such. Probably three fourths of the national "laws" are simply the outer garments of administrative action. Congress holds the purse strings and thereby controls the mainsprings of governmental authority, for without money there is little that any government can do.

ADMINISTRATIVE WORK OF CONGRESS.

Likewise the Congress of the United States is a supervising, inspecting, scrutinizing, investigating body. It has a right to know, before voting more money this year, how last year's money was spent. It has a right to know, before voting money for new projects, whether the expenditure is necessary. To this end it receives all manner of reports, calls for data, imposes restrictions, makes rules, and exercises supervisory functions on a huge scale. It may investigate anybody or anything at any time.[1] When it does so, it becomes vested with many of the functions and most of the authority of a court. During the past few years congressional committees have probed into government contracts, shipping facilities, flood control, soil erosion, aircraft production, and a dozen other matters.

ITS SUPERVISORY WORK.

Surveying the general powers of Congress, therefore, one might say that they are legislative, administrative, supervisory, and investigative — with their importance in the descending order named. We call Congress a lawmaking body because legislation is its most important function; but that function, it should be emphasized, is by no means the only one. If Congress did nothing but make the laws, in the strict sense of the term, it would do its work in a few weeks every year.[2] But it sits for a great many weeks because there are countless other things to do. Congress, not the President, is the basis on which the American system of national government rests, although few citizens

SUMMARY.

[1] Provided that the inquiry is reasonably conducive to the wise and effective exercise of its legislative powers (McGrain *v.* Daugherty, 273 U. S. 135, 1927). The Court decided in 1880 that Congress could not promiscuously explore the private affairs of citizens in the course of a lawful investigation (Kilbourn *v.* Thompson, 103 U. S. 190).

[2] The term "legislature," in fact, is somewhat misleading. It is not derived from the primary functions of early representative assemblies. Those assemblies were convoked by the executive for the purpose of voting revenue and supply, a function that should be differentiated, even today, from that of enacting statutes; and they developed a habit of insisting that redress of grievances should precede supply. When Congress passes money bills or when it investigates the conduct of the executive, its activity is, from the standpoint of history at least, fundamental.

realize it. For although Congress may exalt the President to a high pinnacle of authority by giving him a wide range of discretion within the bounds of law, it can always take away from him what it has given.

THE ENCROACHMENT ON STATES' RIGHTS.

The powers of Congress have been growing ever since its first session, not steadily, but by fits and starts. Many people have deplored this relentless march of federal centralization. They point out that as the powers of Congress expand, those of the states must contract. This may be true, but the expansion of federal authority has been the inevitable result of growth in the size and complexity of the country's political and economic problems. Problems which used to be local have become national. Commerce and communication, industry and investment — they have expanded to a point where they require national regulation, as that is the only kind of regulation that can hope to prove effective. The country, moreover, has grown more nationally minded. The dread of a strong central government and the old insistence on states' rights have been passing away. People are more tolerant of federal intervention than they used to be. The United States have become united.

SOME DANGERS INVOLVED.

But there are dangers in this tendency to look towards Washington for a solution of all the nation's problems. Too much centralization in the body politic may lead to a paralysis of the extremities. Moreover, there is such a thing as overburdening a government and breaking it down. No centralized administration, howsoever efficient, can hope to supply the entire governmental requirements of 130,000,000 people in the twentieth century. It must, perforce, leave much to local self-determination. The question is how much. As little as it can? Or as much as the states and municipalities show themselves competent to do? That is an issue on which opinions will continue to differ.

THE DELUGE OF LAWS.

Congress, in the exercise of its powers, enacts too many laws. So do the state legislatures. There are said to be about two million laws and ordinances at present effective in the United States, or supposed to be effective. This is a mere guess, however, for nobody has ever counted them all. The enacting, revising, amending, interpreting, and enforcing of laws has become one of our great national industries. There is never any depression or unemployment in this field of activity. When industry lags, the laws increase. Statutes fly from the forty-nine legislative capitals in the United States like sparks from so many anvils. Our legislators seem to have forgotten the beatitude that it is more blessed to repeal than to enact.

Laws beget laws. Give a statute time and it will have its own progeny. The increase is like that of microorganisms, by geometrical progression.

A WARNING FROM THE PAST.

The Fathers of the Republic foresaw the dangers of over-legislation and desired to guard against it. Thus, we read in *The Federalist:* [1]

It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow.

We have long since passed this stage. Think of the New York policeman who carries in his pocket a list of the seven thousand ordinances which he is expected to enforce. He is merely the sauntering symbol of a great city's legal helplessness. Our laws are too voluminous to be read, too incoherent to be understood, and often too absurd to be enforced. This is particularly true of the host of regulatory statutes which control the way in which private business can be carried on. The situation points to the greatest obsession of the American people: namely, a faith in the remedial potency of legislation. Laws do not get a nation out of trouble; sometimes they draw a country farther into it. The incessant passing, amending, and repealing of legislation creates an atmosphere of uncertainty in which "no man who knows what the law is today can guess what it will be tomorrow."

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[1] No. 62. Exact authorship uncertain, but certainly written by either Hamilton or Madison.

CHAPTER XXIII

NATIONAL TAXATION AND REVENUES

Taxes are the sinews of the commonwealth. — *Cicero.*

Having surveyed the general powers of Congress and explained the basis upon which they rest, it is now appropriate to examine the more important of these powers, one by one, to see how they are exercised. First among these is the revenue power, the "one indispensable power" that every government must have: — for no government can function without revenue. Every government must have power to tax, in other words, to compel its people to pay for its support.

THE MORE IMPORTANT OF ALL GOVERNMENTAL POWERS.

A tax may be defined as a burden or charge imposed by a legislative authority upon persons or property as a means of raising money for public purposes. Taxation, therefore, is simply the taking of private property for public use under conditions determined by law.

WHAT ARE TAXES?

Taxes differ from most other payments in two ways. First, they are compulsory payments. No one need pay interest, rent, wages, or prices, unless he agrees to do so; but taxes are not the result of any bargain. They are levied without reference to the initiative of those upon whom they fall, except, of course, insofar as these individuals by their votes have an influence in determining the taxing policy of the government. Second, taxes are not adjusted to the amount of service rendered. The man who rides a hundred miles on a railroad pays more than the one who goes half that distance, because he gets more for his money. But the man who pays a thousand dollars in taxes does not necessarily get more in benefits from the government than the one who pays five hundred dollars. In fact, he may not get as much. This may appear to be unfair, but there is no way of avoiding it.

THEY ARE: 1. COMPULSORY. 2. LEVIED WITHOUT REFERENCE TO SERVICES RENDERED.

It would not be possible to base taxes upon individual benefit because there is no way of knowing how much advantage any individual receives from the government's work. Do some citizens obtain more advantage

than others from the maintenance of law and order, or do all derive alike? Who get the greater benefit from well-kept streets — those who drive their motor cars over them, or those whose dwellings front upon the highway? Is the community's expenditure upon the public schools solely for the benefit of those who send their children here? Can it be doubted that the raising of the general standard of literacy is of advantage to everybody, irrespective of parental status? Taxes cannot be adjusted to service; and, even if they could, it would be unwise to do it. The general interest requires that everyone shall enjoy the benefits of national defense, police and fire protection, public education, and the safeguarding of the public health, whether able to pay or not. So taxes are levied to cover the cost of these things by placing the burden upon those who seem best able to bear it.

WHY TAXES CANNOT BE ADJUSTED TO BENEFITS.

Taxes are of various sorts and may be classified in several ways. According to their purpose, they may be designated as either fiscal or regulative. The former are levied for the sole purpose of securing revenue, while the latter are intended (in part at least) to bring about social or economic readjustments. Incidentally they produce revenue, but that is not their sole purpose. The general property tax and the sales tax are examples of a purely fiscal tax, while a protective tariff is regulative in character, since it is designed to promote industry at home. Surtaxes on large incomes, and heavy taxes on inheritances, are also regulative in the sense that they aim to reduce swollen fortunes. The federal tax on narcotics is another example of a regulative tax. Taxation may, of course, be both fiscal and regulative in purpose, and often a tax system is so designed.

CLASSIFICATION OF TAXES:

1. ACCORDING TO PURPOSE: FISCAL AND REGULATIVE.

Another classification of taxes is based upon their assumed "incidence" or final resting place. Direct taxes, such as taxes on land and poll taxes, are supposed to stay where they are placed in the first instance. But indirect taxes, such as customs duties, taxes on the net income of corporations, and excises upon liquor and tobacco, are laid upon the importer, manufacturer, or merchant, with the expectation that they will probably be shifted to the shoulders of somebody else, usually the ultimate consumer. These suppositions, however, are not always in accordance with the facts. Even direct taxes are occasionally shifted, while indirect taxes under some circumstances may remain where they are placed. For this reason the classification of all taxes into two categories, direct and indirect, is not very useful.

2. ACCORDING TO INCIDENCE: DIRECT AND INDIRECT.

In general, the federal government can levy almost any kind of tax, whether fiscal or regulative, direct or indirect; but there are certain limitations upon its taxing power. These restrictions, which are imposed by the Constitution, were originally deemed to be of great importance, but they are no longer so regarded. For example, the Constitution limits the purposes for which taxes may be imposed. Congress may not levy any tax except "to pay the debts and provide for the common defense and general welfare of the United States." That, of course, is not a stringent limitation because the term "general welfare" is such a broad one.[1]

LIMITATIONS ON THE TAXING POWER OF CONGRESS:

1. TAXES MUST BE LEVIED FOR A PUBLIC PURPOSE.

In the second place, the Constitution requires that all duties, imposts, and excises imposed by the authority of Congress shall be uniform throughout the United States. This does not mean, however, that all the states must contribute equally. Congress, in the exercise of its discretion, may adjust the burden of national taxation so that more will fall upon one area or section of the population than upon another, or more upon one class of people than on another. A tax on stock transfers is not void for want of uniformity, although virtually all such transactions take place in large cities and not in rural districts. Uniformity, within the meaning of the Constitution, means that the tax must bear with equal weight wherever the subject of the tax is found. For example, a tax upon alien immigrants has been held to be uniform despite the fact that more than 95 per cent of it is collected at the port of New York. On the other hand, a tax would not be uniform if it made discriminations between the same things in different parts of the country: for example, if levied upon incomes or inheritances at a 10 per cent rate in some states and at a 20 per cent rate in others. But it may be levied at different rates on incomes or inheritances of different size. The requirement of uniformity does not prevent the imposition of graduated tax rates on such things. As a matter of fact, federal taxes on incomes, gifts, and inheritances are steeply progressive: that is, the higher you go in the scale, the heavier is the rate of taxation.

2. TAXES MUST BE UNIFORM.

The rule relating to geographical uniformity is reinforced by another clause of the Constitution which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another. This requires that customs duties on any class of commodities shall be levied at the same rate at every port of entry. Not only this, but the

EQUALITY AMONG PORTS OF ENTRY.

[1] Its scope and application have been discussed in the chapter on "The General Powers of Congress." See pp. 349–350.

methods of determining valuations for duty must be the same. It should be mentioned, however, that goods coming from a country with which the United States has a reciprocal trade treaty are admitted at a lower rate of duty than is imposed upon goods of exactly the same kind coming from a country with which there is no reciprocal treaty. This does not violate the rule of uniformity.

A third limitation upon the taxing powers of Congress relates to exports and to internal tariffs. "No tax or duty," declares the Constitution, "shall be laid upon articles exported from any state." This does not simply mean, as the words at first glance would seem to imply, articles exported from one state to another state of the Union. It includes articles exported from any state of the Union to a foreign country.[1] Hence, Congress is prohibited from taxing exports; and may tax imports only. This prohibition of taxes on exports, it will be remembered, was originally placed in the Constitution at the insistence of the southern states which feared that their commerce might be injured if taxes were laid on the export of tobacco and other agricultural staples. The prohibition of customs duties as between the states is even more rigid, since a state cannot, without the consent of Congress, impose taxes upon either imports or exports.[2]

3. NO TAX MAY BE LAID ON EXPORTS.

In some respects, the provision that Congress may not tax exports to foreign countries has been unfortunate. It has deprived the United States of a means whereby the depletion of natural resources might have been slackened. Exports of timber amounting to many millions of dollars have gone untaxed — notably to the Far East, thus greatly diminishing our available supply. During the years immediately preceding the outbreak of war with Japan, moreover, countless shiploads of oil, scrap iron, and other materials went to that country without yielding a single dollar in export taxes. It should be mentioned, however, that the prohibition of taxes on exports does not restrain Congress from regulating export trade otherwise than by taxing it, or even from prohibiting such trade altogether.

ITS UNFORTUNATE INFLUENCE.

As regards duties on imports, Congress has full power. It may levy import duties of any sort and at such rates as it may determine. This

[1] American Steel *v.* Speed, 192 U. S. 500 (1904).

[2] "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Article I, Section 10, par. 2. By means of their "use taxes," however, some of the states are in effect levying upon goods imported from other states.

power to tax imports has been continuously used by Congress, as everyone knows, since the establishment of the Republic. In earlier days, the main purpose of a tariff on imports was to obtain revenue and only incidentally to protect American industry. But, in the course of time, this order was reversed; the tariff became primarily an agency of protection and only in a secondary sense a means of providing the national government with revenue.[1]

NO RESTRICTIONS ON THE POWER TO TAX IMPORTS.

A fourth constitutional limitation on the taxing power of Congress concerns the imposition of direct taxes. There is a common impression that the national government cannot tax real estate, but must leave this source of revenue to the states and municipalities; this, however, is not the case. Congress has power to levy direct taxes whenever it sees fit, but with the constitutional limitation that "no capitation, or other direct tax, shall be laid unless in proportion to the census of enumeration hereinbefore directed to be taken." [2] In other words, Congress must first fix a specific sum to be raised and then allot to each state its share of any direct tax according to population — not according to wealth, income, or area. Direct taxes levied in this way would obviously place an unfair burden on those states (Arkansas or Mississippi, for example) which have a low per capita rating in wealth and income. Accordingly, no apportionment of direct taxes has been made for over eighty years.[3]

4. DIRECT TAXES MUST BE APPORTIONED.

In due course, however, the question arose whether an income tax was a direct tax and hence would have to be apportioned. At the time the Constitution was adopted, a general idea existed that the only direct taxes were poll taxes and taxes on land. And a few years after the Constitution went into force, the Supreme Court affirmed this idea in a decision which declared that a tax on carriages was not a direct tax; that poll taxes and taxes on land were the only forms of direct taxation; while all other taxes were included within the comprehensive phrase "imposts, duties, and excises." [4] Three of the four justices who heard the arguments in this case had been members of the constitutional convention. Congress later

WHAT ARE "DIRECT" TAXES IN THIS SENSE?

SOME EXAMPLES OF EARLY TAXES NOT HELD TO BE "DIRECT" TAXES.

[1] See also pp. 403–405.

[2] Article I, Section 9.

[3] In 1813, 1815, and 1816, direct taxes were levied to defray the expenses of the war with England and were apportioned among the states. In 1861 a levy of twenty million dollars was similarly ordered by Congress and apportioned, but the southern states refused to pay and Congress subsequently gave back to the other states the sums which they had contributed. Since 1861 no attempt to apportion direct taxes has been made by Congress.

[4] Hylton *v.* United States, 3 Dallas 171 (1796).

levied taxes upon bank circulation, on the receipts of insurance companies, and on inheritances; but it did not apportion them and the Supreme Court held that none of these was a direct tax or needed to be apportioned.[1]

THE INCOME TAX CONTROVERSY: ITS VARIOUS STAGES.

Finally, in 1862, under the stress of heavy demands for war revenue, Congress proceeded to lay taxes on incomes without provision for apportioning the total amount among the states according to their respective populations. Then, for the first time, arose the specific question whether an income tax was a direct tax. After reviewing its attitude in previous cases, the Supreme Court decided that an income tax was not a direct tax, and once more declared that poll taxes and taxes on real estate were the only direct taxes within the meaning of the Constitution.[2] Its decision, however, was not given until many years after the passage of the Income Tax Law of 1862 which, meanwhile, had been repealed by Congress.

1. THE INCOME TAX LAW OF THE CIVIL WAR PERIOD.

This ruling might have been assumed to settle the question forever, but after thirty years it was again revived — and answered in a different way. During the depression of 1893–1894, Congress found itself once more in urgent need of money. So it passed a new income tax law imposing a levy of two per cent on all incomes above four thousand dollars, "from whatever source derived." This law was promptly attacked on the ground that it taxed the income from land, and hence, in effect, taxed the land itself.

2. THE INCOME TAX LAW OF 1894.

ITS UNCONSTITUTIONALITY.

The Supreme Court, after two hearings, upheld the contention that a tax on the income from land is not distinguishable from a tax on the land itself, the latter being admittedly a direct tax.[3] Like a tax on land, therefore, it would have to be apportioned. Thus, by a close decision, in which four out of nine justices dissented, the Court held the Income Tax Law of 1894 to be unconstitutional.[4]

This decision aroused a storm of disapproval, especially in the agricultural states, and a movement was started to remedy the situation by a constitutional amendment. Not until 1913, however, was this agitation successful. In that year a sufficient number of the states gave their assent to the sixteenth amendment,

3. THE SIXTEENTH AMENDMENT (1913).

[1] Veazie Bank *v.* Fenno, 8 Wallace 533 (1869), and Scholey *v.* Rew, 23 Wallace 331 (1874).
[2] Springer *v.* United States, 102 U. S. 586 (1881).
[3] A majority of the justices also held the income tax unconstitutional on other grounds as well: e.g., because it taxed the income from state and municipal bonds. For a discussion of this question see p. 373.
[4] Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429 (1894); 158 U. S. 601 (1895).

which provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the states and without regard to any census or enumeration." Immediately after the adoption of this amendment, a new federal income tax law was passed by Congress, and during the past thirty years a whole series of such laws has gone on the statute book, levying taxes on the incomes of individuals, partnerships and corporations. Today, the proceeds of these taxes form the largest single factor in the national revenue. It should be pointed out, however, that the sixteenth amendment does not relieve direct taxes, other than income taxes, from the necessity of apportionment. A tax on land, if Congress should at some future time decide to levy such a tax, would still be subject to the original requirement.

4. THE PRESENT INCOME TAX LAW.

The power of Congress to levy upon incomes, without apportionment, is now beyond question; but this does not mean that no income tax law can, henceforth, be held unconstitutional. It may be attacked on other grounds. The Constitution provides, for example, that the salaries of federal judges "shall not be diminished during their continuance in office" and gives a similar protection to the salary of the President. Does the sixteenth amendment, in permitting Congress to tax incomes "from whatever source derived," overrule this earlier provision? At first, the Supreme Court decided this question in the negative. It held that, in effect, a tax on the income of a federal judge diminished his salary and therefore violated the Constitution, even if the income-tax law had been enacted before his appointment.[1] But in 1939 the Court reversed itself.[2] In this later decision it held that the independence of judges (which the constitutional provision was intended to give) would not be impaired:

> by making them bear their *aliquot* share of the cost of maintaining the government. . . . To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose constitution and laws they are charged with administering.

All of which seems to be common sense, for surely the framers of the Constitution, in seeking to prevent a resentful Congress from ever cutting a judge's salary, did not intend to relieve all federal judges from the general obligations of citizenship. As for the President, he has never

[1] Evans *v.* Gore, 253 U. S. 245 (1920), and Miles *v.* Graham, 268 U. S. 501 (1925).
[2] O'Malley *v.* Woodrough, 307 U. S. 277.

raised the issue; every occupant of the White House since 1913 has paid his income tax without protest.

TAXING STATE INSTRUMENTALITIES

IMPLIED LIMITATIONS.

All of the foregoing limitations on the national taxing power are expressly imposed by the Constitution. But there is an additional limitation which the Constitution does not impose, but which has been deemed to arise out of the very nature of the federal union. This is the proposition that the national government should not tax the "instrumentalities of the states," in other words, the salaries of state and municipal officers or the income from state and municipal bonds. The argument has been that, if the national government could tax the operations of the states in this way, it would have the power to put the states out of business. If the nation and the states are coordinate governmental entities, each having full authority within its own sphere — then it is contended that the one should have no power to hamper the other by taxing its instrumentalities of government.

THE IMPLICATIONS OF McCULLOCH *v.* MARYLAND.

Considerably more than a hundred years ago, when a famous case in point came before it, the Supreme Court ruled that a state could not tax the agencies of federal administration, such as the post offices, the customhouses, the notes of national banks, or the salaries of federal officers.[1] This decision was based upon the principle that the various states, if given authority to tax the federal mechanism, would have power to stop its wheels entirely. For the power to tax, as the Court said in this case, "involves the power to destroy." And logic seemed to require that such a rule must work both ways; therefore it was held, in a number of decisions, that Congress could not tax the salaries of state or municipal officers, or the income from state or municipal bonds.[2] But, during recent years, this dual exemption has been gradually breaking down. First of all, the Supreme Court held that where a state or municipality engages in some money-making enterprise, such as operating a liquor dispensary or a street railway, the earnings of employees in such work may be taxed, as in any similar form of private business.[3]

Likewise, it ruled that persons who derive an income from public works constructed under contracts with states or municipalities are not entitled to any exemption.[4] In other more recent cases the exemption

[1] McCulloch *v.* Maryland, 4 Wheaton 316 (1819). See also pp. 427–428.

[2] For example, in Collector *v.* Day, 11 Wallace 113 (1871) and in Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429 (1894) and 158 U. S. 601 (1895).

[3] South Carolina *v.* United States, 199 U. S. 437 (1905).

[4] Metcalf *v.* Mitchell, 269 U. S. 514 (1926).

has been further whittled away. Finally, by reciprocal action of Congress and the state legislatures, it has been agreed that the federal government may tax the salaries of state and municipal officials, while the states, in turn, may tax the salaries of federal officers residing within their borders. It is understood, however, that there will be no discriminatory taxation in either case: that is, no heavier rates levied upon the officials than upon private citizens receiving the same salaries.

AND THE MORE RECENT REVERSALS.

This reciprocal arrangement has not yet been made with respect to the taxation of income from federal and state bonds. Such obligations still remain mutually tax-exempt, and this creates an embarrassing situation with respect to the raising of public revenues. Many billion dollars in federal obligations (direct and indirect) remain exempt from state income taxes, while the income derived from state and municipal bonds remains out of the federal government's reach. This means, as a practical matter, that the rate of taxes and surtaxes on individual incomes cannot be raised above a certain point because the owners would then transfer their holdings into tax-exempt securities. Suppose, for example, that a man has an income of $100,000 per annum derived from industrial stocks and bonds which yield him an average of 4 per cent. If the government were to place taxes and surtaxes on his income at the rate of 50 per cent, he would find it profitable to shift his investments into tax-exempt bonds, even if their yield were as low as $2\frac{1}{2}$ per cent. These tax-exempt bonds are now so strongly favored by wealthy individuals that they can be sold at an abnormally low rate of interest by the states and municipalities which issue them. The situation ought to be corrected by a constitutional amendment which would provide that the income from all government bonds hereafter issued shall be subject to taxation, like the income from the securities of any private corporation.

INCOME FROM GOVERNMENT BONDS.

Possibly a constitutional amendment would not be necessary to achieve this result. There is reason to believe that if a statute were passed by Congress, taxing the income from future issues of state and municipal bonds, it would be upheld by the Supreme Court as a constitutional exercise of the federal taxing power. But, as a practical matter, neither a constitutional amendment nor a statute making such a provision would be easy to secure. The reason is that the states and municipalities (cities, counties, towns, etc.) are naturally opposed to what would deprive them of an important financial advantage which they now enjoy: namely, the right to borrow money by the issue of bonds which are entirely free from

WHY THE SITUATION IS NOT CORRECTED.

federal taxes on the income derived therefrom. They know that if the exemption were eliminated they would have to pay a higher rate of interest on all new issues of bonds, and such additional payment would increase their own state and local taxes. So they have put up a fight in Congress against the plan to tax their "instrumentalities of government," and thus far they have been successful. It seems probable, however, that their opposition will some day be overcome and the reciprocal taxation of income from all government bonds permitted.[1]

Two widely held impressions concerning the nation's power to tax have no basis in law or in fact. The first is the popular belief that "double taxation" is unconstitutional, in other words, that the same thing must not be taxed twice. There is nothing in the Constitution of the United States to prohibit double taxation; the same salary, for example, may be taxed by both national and state governments. So may the same gift or legacy or inheritance. An estate or inheritance, indeed, may be taxed three or four times — by the federal government, by the state in which the decedent lived, by the state in which the heirs live, and by the state in which the inherited property is located. An estate tax, that is, a tax on the estate of a deceased person, is the most popular of all taxes from the legislator's point of view — for dead men have no votes. Gasoline taxes are sometimes levied by both the national and state governments. Corporations pay taxes on their net profits, and then when these profits are distributed to the stockholders in the form of dividends, the latter are taxed as income — sometimes by both the federal and state governments. To the taxpayer this double or triple taxation may seem unfair, and often it is; but multiple taxation is not unconstitutional and never has been.

POPULAR ERRORS: 1. CONCERNING "DOUBLE" TAXATION.

The other widespread, but erroneous, idea is that there must be "no taxation without representation." This notion has a good historical lineage in the United States, but whatever its worthiness as a slogan, it has never been the law of the land. The nation and the states may tax people without giving them representation; there is nothing in the Constitution that forbids it. The people of the District of Columbia, for example, are subject to taxation like those in the rest of the country, yet they elect no mayor, councilmen, or other local officers, they are not represented in either

2. CONCERNING TAXATION AND REPRESENTATION.

[1] To avoid any misapprehension, it should be mentioned that the federal government can and does tax *the income from its own bonds* and that the states, if they have state income taxes, can levy such taxes on state and municipal bonds. The issue relates only to the cross-taxation of these securities.

House of Congress, and they have no voice in the election of the President. Some years ago the Supreme Court, in a controversy which involved this question, unanimously decided that Congress has an undoubted right to tax without granting representation.[1]

These, then, are the taxing powers of the federal government, and the limitations upon them as interpreted by the courts. Have they been adequate to the raising of national revenues? It was assumed by the framers of the Constitution that Congress would frequently impose land taxes, or poll taxes, and apportion such taxes among the states, but this source of federal revenue has proved of negligible importance during the past hundred years. The national government has depended at all times for the bulk of its revenue upon other forms of taxation, particularly upon customs duties, excises, and more recently upon corporation taxes, individual income taxes, estate or inheritance taxes, gift taxes, excess profits taxes, pay roll taxes, and a variety of miscellaneous taxes. Until after the beginning of the twentieth century, the revenue from import duties and excises formed the most important factor in the federal government's income, but during the past forty years the inflow from other sources has steadily increased until today more than half the total comes from the taxation of corporate and individual incomes, while levies on inherited estates and on pay rolls bulk large in the balance.

HOW CONGRESS HAS EXERCISED ITS TAXING POWERS.

DIRECT TAXES.

EXCISES OF ALL SORTS.

In recent years the national government has levied taxes totaling over forty billion dollars per year, or approximately three hundred dollars per capita of population.[2] Customs duties, as has been said, bring in a very small percentage of this total. Excise taxes on alcoholic liquors, tobacco, cigars, cigarettes, playing cards, cameras, firearms, gasoline, theater tickets, club dues, telegraph and telephone tolls, railway and Pullman car tickets, stock transfers, cabaret bills, and what not — these yield a much larger fraction. Taxes and surtaxes on the net incomes of individuals and corporations bring in many billions. So do the taxes on the excess profits of corpora-

PRESENT-DAY FEDERAL TAXES.

[1] Heald *v.* The District of Columbia, 259 U. S. 114 (1922).

[2] Here are some recent yields:

	Receipts		
	1942	1943	1944
Income taxes	$7,960,000,000	$16,094,000,000	$33,027,000,000
Miscellaneous internal revenue	3,847,000,000	4,553,000,000	5,355,000,000
Social security taxes	1,016,000,000	1,289,000,000	1,473,000,000
Taxes on carriers and their employees	170,000,000	209,000,000	265,000,000
Customs duties	389,000,000	324,000,000	431,000,000
Other sources	286,000,000	916,000,000	651,000,000
Total	$13,668,000,000	$23,385,000,000	$41,202,000,000

tions. The estate tax and the gift tax also produce a good deal, but more in some years than others, depending on the number of large estates which become taxable through the decease of their owners. Mention should also be made of the excises which were levied on certain products in process of manufacture, as a means of promoting soil conservation through curtailment of agricultural production.[1] Finally, the national treasury receives a considerable amount of miscellaneous revenue in the way of fees, fines, penalties, profits on the coinage, money received from the sale or lease of public lands, etc.

The war on two fronts, into which the United States was plunged during the closing days of 1941, demanded an enormous increase in the national revenues. Income taxes and surtaxes were heavily increased; exemptions were lowered; taxes on excess profits were raised to topnotch figures, and prospects for a federal sales tax loomed into view. With the increase of industrial employment and with higher wages, the proceeds from pay roll taxes for social security soared upwards. Even so, the total revenues did not nearly suffice to defray the wartime expenditures. Billions upon billions had to be borrowed by the issue of bonds.

It is sometimes said, and with a modicum of truth, that in the United States we have no "system of taxation." The taxing powers of the states overlap those of Congress, for the states are at liberty to tax practically everything except imports, exports, and the income from federal bonds. Most of the states now have inheritance taxes and taxes upon corporations, while several have imposed personal income taxes as well. Some of them have sales taxes which cover commodities on which a federal excise tax has already been imposed, for example, on gasoline, liquors, and tobacco. In fixing their respective rates of taxation, moreover, the nation and the states pay little or no heed to each other. Each regards its own necessities. This is hard on the taxpayer because the cumulative burden falls on him. The taxation of property, incomes, inheritances, and sales ought somehow to be planned for the country as a whole and not left at the mercy of competing governments. Competition for revenues between rival taxing authorities, each of which endeavors to gather all it can from the same sources, can never be made the basis of sound public financing. On more than one occasion there has been an attempt to promote some sort of agreement between the nation and the states whereby each would be given its own separate sphere of taxation, but success has not yet attended this effort.

THE WIDENING FIELD OF FEDERAL TAXATION.

The future of federal taxation ought to have a word because certain

[1] See p. 464.

features of national policy in this field are now becoming clear. It is unlikely that tariff duties will ever again contribute a large proportion of the total revenue. Excises will undoubtedly be continued and possibly stiffened, especially upon luxuries. We may look for the continuance of heavy taxes on individual incomes and on the profits of corporations. The pay roll tax for social security will doubtless be increased. The imposition of a federal sales tax has been proposed and such a tax would undoubtedly yield a large sum, even at a low rate. The objection to a sales tax is that it places an unduly heavy burden on the low-income groups. It would also tend to reduce retail purchases and might, in some measure, accentuate an economic depression. A general sales tax, moreover, is frowned upon by many legislators as being of a too high visibility. They prefer a tax that can be placed upon all the people without most of the latter realizing it.

THE FUTURE OF TAXATION.

This prompts the suggestion that on no subject is there so much opacity in the public mind as on questions of taxation. On none is there so much muddled thinking. Most Americans seem to take for granted that a tax stays where you put it, and hence that when you tax a hotel, a store, or a factory, the money comes out of the owner's pocket. When the taxes on an apartment house go up, the tenants sometimes chuckle because they think that only the landlord is out of luck and it serves him right.

THE NEED FOR PUBLIC EDUCATION IN TAX MATTERS.

Now nothing could be farther from sound economics than this idea that all taxes stay where they are put. Landlords and storekeepers are for the most part only the middlemen who pay the taxes in the first instance and then collect the money, every dollar and more, from their tenants and customers. Nearly all taxes, of whatever sort, percolate into the cost of living. There is almost no such thing as a nontaxpayer — at any rate, not outside the prisons and poorhouses. Everybody who smokes cigarettes, for example, pays taxes. What he smokes, indeed, is mainly taxes, not tobacco; because more than half the cost of this commodity is made up of excises levied by Uncle Sam and sales taxes imposed by the state.

THE INCIDENCE OF A TAX.

A government, of itself, produces no income. It earns no money, saves no money, accumulates no capital, makes no profits, and pays no dividends. A government merely lives off the earnings of the country, the whole country. It simply takes a part of what its citizens have earned and gives them in return such services as it thinks they ought to have. Hence it is folly to imagine that taxes come only from the pockets of the well to do and place no burden upon the average man. It is supreme folly, because most of our extrava-

A GREAT AMERICAN DELUSION.

gance in government is attributable to the popular delusion that only the well to do are mulcted because of it. Who pays the taxes on gasoline, on admissions to motion-picture houses, on beer, on tobacco? Doesn't an excise on processed wheat go into the price of bread, and the income tax on dentists' earnings into the cost of dentistry? Who is there to pay the excises on jewelry or radios except the people who buy the products? If the average voter would ask and answer such questions for himself, there would be a more widespread interest in governmental economy.

COLLECTING THE REVENUE.

The work of collecting the national revenue is in the hands of the secretary of the treasury, but is chiefly performed by two agencies in his department: namely, by the bureau of internal revenue and the customs service. For the collection of duties upon imports, the country is divided into customs districts, each with a main port of entry in charge of a collector or deputy collector of customs. Imports can be sent "in bond" to interior parts of the country and the duties collected there by local collectors of customs. For the collection of internal revenue taxes, the country is divided into a larger number of similar areas, each also in charge of a collector. The work of these officials includes not only the collection of excises but of corporation and individual income taxes as well. All collections are deposited to the credit of the United States in the nearest federal reserve bank or in other banks which have been approved as government depositories. In order to qualify as a depository, a bank must fulfill certain statutory conditions. Money deposited in these banks is paid out on checks issued by the disbursing section of the treasury department. In addition to its funds for current use, the national government owns a huge reserve of gold and silver coin and bullion. Most of this is kept in heavily guarded storage vaults built for that purpose in Kentucky, in Colorado, and at West Point, New York.

ACCOUNTS AND AUDITS.

The accounts of every officer connected with the collection of revenue are regularly audited by officials of the general accounting office under the direction of the comptroller general. This official is appointed by the President, with the approval of the Senate, for a fifteen-year term. He is irremovable except by impeachment or by a joint resolution passed by both Houses of Congress. On one occasion, President Franklin D. Roosevelt requested Congress to change the laws so that the comptroller general would be subject to removal by the President at any time; but Congress declined to do this.

The auditing functions of the general accounting office cover expenditures as well as collections. Its duty is to see that no payments are made for salaries, supplies, materials, etc., except where money to cover such

expenditures has been duly appropriated by Congress. If all this checking had to be done before the payments were made, it would delay the latter unduly; hence, it has become the practice to let many of the payments go through and do the checking later. Then, if anything is found to be wrong, a refund of the amount is obtained.

The general accounting office is independent of all departments, thus ensuring impartiality in the conduct of its work. This work of auditing, it need scarcely be added, is of huge dimensions, because almost every bureau or office in all departments of the government is receiving money from some source — in taxes, fees, charges for patents, copyrights, steamboat licenses, fines in the federal courts, proceeds from the sale of property, or confiscated merchandise, etc. The number of checks issued in payment for expenditures likewise runs into the millions every year.

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CHAPTER XXIV

NATIONAL EXPENDITURES AND THE NATIONAL DEBT

It is impossible for the King to have things done as cheap as other men. — *Samuel Pepys.*

THE RISING COST OF GOVERNMENT.

Back in 1916 it cost less than three quarters of a billion dollars to cover a year's expenditures by the national government. Twenty years later, in 1936, it cost more than nine billions. In neither of these years was the country engaged in war. Why should there have been such an extraordinary rise in national expenditures within the space of two decades?

THE REASONS FOR IT:

THE LAW OF INCREASING COSTS.

The answer is easy enough. Modern government is conducted under the law of increasing costs per capita. The more populous a country becomes, and the higher its general standard of living, the larger is the cost of government for every unit in its population. National greatness is an expensive luxury. It might be thought, offhand, that when a government (either national, state, or local) does things on a large scale, it would be able to do them more cheaply, which is what usually happens in the case of business concerns, but it is not so in public enterprises. Take a commonplace example — the cost of policing a city. With a population of 50,000 this work is found to be costing so much per capita. But let the city double its population within ten years (as some American cities have done), will this mean that its police cost per thousand of population can be lowered? Quite the contrary; it will be increased. The larger the city, the higher its per capita cost of government in all departments. The reason is that the people who live in bigger and more progressive cities demand better, and hence relatively more expensive, services than those who live in smaller and more backward cities.

This demand for new services, as well as for the improvement and extension of old ones, is largely responsible for increased public expenditures in nation, states, and cities alike. To get some realization of this, one need only look over the list of new responsibilities which

the public authorities have assumed during the past twenty or thirty years. To enumerate all of these would take several pages of this book; nor is there any need to do it, because everyone who reads the newspapers must have sensed the rapidity with which the expansion has been going on. In the promotion of agriculture, the regulation of industry, as well as in such matters as public health, social security, the control of radio broadcasting, the supervision of stock-exchange operations, labor relations, and in a dozen other fields, the extension of governmental activity has been apparent to everybody. Even before the United States entered the Second World War, this expansion was proceeding at a rapid rate.

HOW GOVERNMENTAL ACTIVITIES ARE EXPANDING.

New governmental activities rarely start full blown. They begin, as a rule, in a small way. Something seems to call for help from the public authorities, with very little expenditure involved. Or the assistance is merely needed to tide over an emergency. But the new service starts growing like a sycamore tree, sending out its branches in all directions, so that its roots must presently receive more nourishment. The emergency passes; but those who are administering the new governmental activity are not easily pried loose from their jobs. They hang on, like barnacles to a ship, and their friends use all manner of political pressure to help them do it. If the work for which they were appointed becomes no longer needed because of changed circumstances, they will seek and find something else that needs to be done and argue that they are the best ones to do it. A single illustration will suffice. During the economic depression of the thirties, for example, it was found advisable to set up civilian conservation camps as a way of providing work for the thousands of able-bodied young men who could not obtain employment on the farms or in the factories. But in the early forties, when the war program was providing plenty of jobs, the plea was put forth that the project should be continued as an agency for youth education, and only after a stiff fight against formidable administrative opposition did Congress manage to force the abolition of these camps.

THE WAY IT HAPPENS.

Few things are more tenacious of life than a government board or bureau. Were there no restraints on their multiplication and longevity, it is hard to say how large a percentage of the people would become officials of government and regulators of the nation's way of life. This prompted Prime Minister Winston Churchill to say, not long ago: "Let us beware of trying to create a society in which nobody counts for anything except politicians and officials, a society in which enterprise gets no reward and thrift no privilege."

Three hundred years ago Samuel Pepys, the English diarist, who had

managed to anchor himself on the public pay roll for a goodly portion of his life, remarked that the king's business was always an expensive affair. It could not be done as cheaply as other business. That remark has held true in all ages and in all governments, whether monarchical or republican. In governmental expenditures the pressure is almost always in one direction. Nearly everyone stands to gain by pushing the budget upwards — everyone except the taxpayer. Within the governmental circle there is hardly anyone whose chief function is to see that the taxpayer receives full value for what he pays. And this is not surprising, because government departments are spending money which they have not had to earn or raise.

THE HIGH COST OF PUBLIC BUSINESS.

In the national budget of a wartime year, the military and naval expenditures are vastly larger than all other items put together.[1] But even during war there are huge expenditures for civil purposes. Interest on the national debt now takes well over two billion dollars per annum.[2] Assistance to agriculture, in one form or another, absorbs another billion. Public works of all kinds, including highways, make heavy demands each year on the nation's pocketbook. Work relief was a large item until the war program provided additional employment. Even yet, the expenditures under the heading of unemployment compensation are considerable. Social security, including old-age annuities, is becoming a heavier charge each year. Veterans' pensions and benefits cost more than half a billion annually before the Second World War began. One hesitates to estimate what they will be now that it is over. Finally, there is a long list of regular civil departments and agencies, no one of which requires a very large appropriation; but, in totality, their expenditures mount up to a billion or more. Strange as it may appear, the outlay for the support of Congress, the President's office, and the whole system of federal courts, is relatively small — less than fifty million dollars per annum.

THE CHIEF ITEMS IN THE NATIONAL BUDGET.

War itself, not to speak of its aftermath of pensions, exacts a heavy financial toll. Military and naval expenditures, which soar above receipts, bloat the national debt as with a dropsy. We entered the First World War in April, 1917, but for months before that time had been expanding and equipping our armed forces in preparation for war. Figures for the fiscal years 1916–1919 tell a graphic story.

WAR COSTS.

[1] Four times as large in 1942, almost twelve times in 1943, over fourteen times in 1944, and almost eleven times in 1945.

[2] It rose from $1,260,000,000 in 1942 to $1,808,000,000 in 1943; to $2,609,000,000 in 1944; and to $3,617,000,000 in 1945.

	Expenditures		*Debt*	
Year	*Total*	*Per Capita*	*Total*	*Per Capita*
1916	$ 734,056,000	$ 7.29	$1,225,145,000	$11.96
1917	1,977,681,000	19.36	2,975,618,000	28.57
1918	12,697,836,000	122.58	12,243,628,000	115.65
1919	18,522,894,000	176.40	25,482,034,000	246.09

Peacetime economies brought expenditures down to $30 per capita in 1927, after which, over a period of six years, the amount gradually increased by a third. Similarly, the debt was reduced almost to sixteen billion dollars or $131.38 per capita in 1930. Expenditures averaged less than $37 per capita during the four years of President Hoover, but over $68 during the first eight years of the New Deal, which, having to cope with the severe economic depression, poured forth from the treasury colossal sums, both to relieve the unemployed and to "prime the pump" of industry. The debt rose to twice the wartime peak of 1919. Then, after the attack on Pearl Harbor, we went to war with the Axis powers. Per capita expenditures mounted to $242 in 1942; $594 in 1943; $716 in 1944; and $767 in 1945. This, of course, was reflected in the rapid growth of the national debt, which, by the close of 1945, had passed the $250,000,000,000 mark.

War also brings in its train the danger of something worse than heavy taxation and debt. Without judicious financing its cost may take the catastrophic form of inflation. The causes of inflation are complicated: consumer goods become scarce as industrial plants turn to warlike activities; wages rise as the reservoir of workingmen approaches exhaustion; prices soar as men bid against each other for the limited supply of commodities; and, failing to understand the cause of the deep-seated malady, a government may try the desperate expedient of issuing additional amounts of paper money in order to offset the rise in prices. Then, the value of this money, in terms of goods and services, sinks lower and lower, which is merely another way of saying that the value of goods and services in terms of money (i.e., the general level of prices) goes higher and higher. The premonitory signs of inflation reveal themselves early, however; and the government may intervene to check the rise in prices. Late in April, 1942, President Roosevelt urged Congress to act along this line. His program included seven main points: heavier taxation, price ceilings, stabilization of wages, a return to parity in agricultural prices, the rationing of scarce essential commodities, restrictions upon credit and installment-buying, and a nation-wide drive for the sale of government bonds to private individuals, which would reduce excess purchasing power as well as help

DANGER OF INFLATION.

finance the war. These measures, most of which were put into operation, helped to keep inflation in bounds during the war years.

THE BUDGET SYSTEM — PAST AND PRESENT

How is the allotment of money to various governmental purposes determined each year? It has long been a principle of sound administration that no public money shall be spent except after authorization by the representatives of the people. Accordingly, there is a provision in the Constitution of the United States that "no money shall be drawn from the treasury but in consequence of appropriations made by law." The most essential step in all national expenditure is, therefore, that Congress shall make an appropriation in the form of a law. These appropriation laws are often elaborate affairs — sometimes with thousands of items. But before an appropriation bill can be submitted to Congress, there are some preliminary steps, the first of which is the preparation of estimates.

HOW APPROPRIATIONS ARE AUTHORIZED.

Most of the national government's functions (such as aid to agriculture, public works, pensions, the administration of justice, social security, work relief, etc.) are in the jurisdiction of some administrative department, board, bureau, or office. Each of these agencies makes an estimate of the amount of money that it will require for the ensuing fiscal year. Such estimates are not mere guesswork, but are figured with a good deal of care by taking the previous year's expenditures as a basis. Prior to 1920 all the estimates were sent to the secretary of the treasury, who merely turned them over to the Speaker of the House without any revision or comment. Along with these figures the treasury department likewise transmitted its own estimate of the probable revenue that would come in under the existing tax laws.[1]

THE ESTIMATES.

Then the Speaker distributed the estimates of expenditure to various committees, eight or nine of them — the committee on military affairs, on post offices, on agriculture, etc., each getting the estimates in its own field. These committees thereupon reviewed the figures and submitted to the House various appropriation bills based upon their own conclusions as to what money ought to be voted. But each committee did its work independently: no one of them knew what the others were doing. One committee

THE OLD PLAN OF CONSIDERING THEM.

[1] Yet (though the President did not avail himself of the authority) Congress had, in 1909, empowered him, in case of an estimated deficit, to propose means of balancing the budget, either by reducing expenditures or increasing revenues. E. E. Naylor, *The Federal Budget System in Operation* (Washington, 1941), p. 18.

might be trying to economize, while another was cutting loose with extravagance. It was a very unsystematic way of doing things.

ITS RESULTS.

To make matters worse, each committee found itself beset by lobbyists, department heads, and bureau chiefs — all urging increased appropriations. This and that congressman, moreover, came importuning the committee for something that would please the voters in his own district — a new post-office building, a harbor improvement, a naval repair station, an army hospital — anything that would please the home folks. To use the vernacular of the day, everybody tried to "dip his paws into the pork barrel," and the waste involved was enormous. Only a rich and prosperous nation could have endured it. But as long as a large amount of revenue came in, chiefly from the proceeds of the protective tariff, it was hard to impress the country with the need for budgetary reforms which would promote economy.

HOW IT BROKE DOWN.

The entry of the United States into the World War of 1917–1918 put a different face on things. National expenditures went up so rapidly that the cry for "economy and efficiency" resounded from all corners of the land. Congress was somewhat slow to move, but, in 1920, it was induced to pass an act which provided for a regular national budget system. President Wilson vetoed this measure because it contained certain objectionable provisions, but in 1921 the Budget and Accounting Act was readopted with some of the objectionable features eliminated.

THE NEW BUDGETING AGENCIES.

The national budget system continues to rest on the provisions of this measure. First of all, the act set up two new agencies of financial control: namely, the general accounting office and the bureau of the budget. To the first of these it gave the function of auditing the accounts of all the national services, as already explained.[1] But, in addition, it gave the comptroller general, who is at the head of the general accounting office, the right to investigate all matters relating to revenues and expenditures. The other new agency, the bureau of the budget, received a virtually independent status, although it was nominally attached to the treasury department. In 1939, after this arrangement had been found unsatisfactory, the bureau was transferred to the executive office of the President, where it continues to be. Its head, the director of the budget, is appointed for an indefinite term by the President (without confirmation by the Senate) and is responsible to him alone. He is, in fact, the President's personal adviser on all matters relating to national

THE DIRECTOR OF THE BUDGET.

[1] See p. 378.

expenditure. So long as the director has the President's confidence, he virtually determines what items of expenditure shall be recommended to Congress and what ones shall not. Thus, the director of the budget, rather than the secretary of the treasury, has become a modified copy of the English chancellor of the exchequer.

What is a budget? It may be defined as a plan of financing for the incoming fiscal year.[1] This involves an itemized estimate of all revenues on the one hand and of all expenditures on the other. A properly constructed budget should, under normal circumstances, be balanced, that is, the anticipated revenues should at least equal the anticipated expenditures and preferably should show a small surplus in order to be on the safe side. When estimated revenues are insufficient to cover the anticipated expenditures, the budget is said to be unbalanced, for the outcome will be a deficit which has to be liquidated by borrowing. A succession of unbalanced budgets will inevitably result in an increase of public indebtedness. That is what happened during the period 1930–1946. Year after year there was a heavy deficit, which could not be avoided in view of the abnormal expenditures which the national government had to make in alleviating a depression and winning a war.

A BUDGET DEFINED.

BALANCED AND UNBALANCED BUDGETS.

The present-day procedure in making the national budget is, therefore, as follows: first, each department, as well as each independent bureau, board, commission, office, or service, prepares a detailed statement of its financial needs for the ensuing fiscal year. The figures are segregated under three headings — personal services, supplies, and capital outlays — but within each group the expenditures are itemized. For example, the salary of every employee must be set forth individually. All these data are typewritten on standard forms which then go to the bureau of the budget where they are assembled and put in shape for revision.

PROCEDURE UNDER THE NEW BUDGET SYSTEM:

The director of the budget goes over the figures, makes note of the various requests for increased appropriations, and confers with heads of departments or other officials concerning their reasons for asking for more money. This work, as a matter of fact, is largely done by the members of his staff, usually by specialists who are known as examiners. Rarely does it happen that any department or bureau fails to ask for more money. Bearing in mind that the bureau of the budget is likely to trim his figures, the official who submits the estimates is likely to ask for more than he expects his department or bureau to get. Not infrequently there is disagreement as to what he ought

1. THE ESTIMATES.

[1] The fiscal year, in American national finance, begins on July 1.

to get, and when such divergence arises on any important item, the question is usually referred to the President for decision; but, under the law, the director of the budget has the power to make whatever changes he deems advisable. While this is going on, the director of the budget also obtains data from the treasury as to revenue and prepares an itemized report showing the anticipated national receipts for the fiscal year, including revenues from existing and proposed taxes.

2. THE EXECUTIVE RECOMMENDATIONS.

When this work of revising and compiling is completed, the whole array of figures is combined into a ponderous document of several hundred pages which is thenceforth known as the budget. After approval by the President, it is printed by the government printing office and then sent to Congress. In sending it, the President may, and sometimes does, call attention to the more important increases, explaining the reasons therefor and suggesting that additional revenues be provided to take care of the higher expenditures. Thus the executive branch of the government has now become almost fully vested with the *initiative* in planning the financial policy of the nation.[1]

3. LEGISLATIVE ACTION.

Then comes the next step. The House of Representatives receives the budget from the President. Without debate the appropriations section of the document is referred to its committee on appropriations, which consists at present of forty-three members.[2] This committee — after making a general survey and perhaps insisting upon certain economies — in turn refers the various groups of items to eleven subcommittees for detailed study and public hearings. These subcommittees, which are organized mainly along departmental lines, work on the figures and, whenever necessary, call in the various executive officials to explain their respective needs and requests. Where large increases over the previous year are asked for, the officials have to justify them. Sometimes they are questioned in great detail. Anyone who desires to go on record as opposing an appropriation may also be heard. Then, when this study of the figures has been completed, each subcommittee drafts its own bill and reports it to the general committee. The latter, after a further review, during which it may make considerable changes, sends the various appropriation bills to the House.

In this way the House gets the whole story, but not all at once. It receives a dozen or more appropriation bills in succession, and debates

[1] For one exception see p. 391.

[2] Twenty-five are chosen from the majority party in the House, and eighteen from the minority. The size of the committee and the relative strength of the parties on it vary from Congress to Congress.

these one after another. Meanwhile, the ways and means committee of the House busies itself with the task of studying new tax levies to meet the increased costs. It holds hearings, and, when these are concluded, it reports one or more revenue measures to the House. As far as the House of Representatives is concerned, therefore, two committees control the presentation of all financial measures. The House itself, however, may make changes in either the appropriation or tax measures when these come to it on the floor, and sometimes it does so.

SUPPLEMENTARY AND ADDITIONAL APPROPRIATIONS.

Not all the anticipated national expenditures for the year, of course, can be embodied in these regular appropriation bills. In preparing these estimates, some things are always overlooked by the various departments, no matter how careful they may try to be. Wholly unexpected needs will sometimes appear on short notice. Floods, droughts, and depressions may upset the best-laid plans. Moreover, new proposals of legislation, some of which involve the expenditure of money, are introduced by individual congressmen at every session. For congressmen have jealously reserved their right to introduce bills and resolutions of every nature, whether involving expenditure or not. Such proposals of expenditure do not go to the bureau of the budget, but are first sent to the specialized committees (e.g., foreign relations, post offices, or interstate commerce) for consideration on their merits. If favorably reported on by one of these committees, the bill is then transmitted to the committee on appropriations for approval of the expenditure involved.

EXAMPLES.

A proposal to increase the membership of the interstate commerce commission, for example, would go first to the committee on interstate and foreign commerce. If favored by that committee, it would then have to be reviewed by the committee on appropriations, inasmuch as an increased membership would involve a larger expenditure for salaries. The common practice of the committee on appropriations is to take a number of these individual proposals and combine them into a single appropriation bill. Thus, it will be seen that what begins as a unified budget winds up as a whole series of separate measures, a dozen or more of them. The opportunities for waste and extravagance have been greatly reduced by the existing budget procedure, as contrasted with those of the old days, but they are still numerous enough. The privilege of proposing new expenditures, which every congressman retains, opens the door to considerable abuses.

Sometimes one of these special appropriations, in order to facilitate its consideration by the House, is tacked on to a general measure as a "rider." For example, a bill to deepen the harbor in some favored con-

gressman's district may be hitched on to the appropriation for the war department, thus giving it momentum which it would not obtain by traveling through the House under its own steam. This habit of tacking rider-appropriations onto general bills is one of the practices which help to throw a well-organized budget out of balance. It would be a good thing if provision could be made whereby no proposal of expenditure could be suggested except on the initiative of the appropriations committee.

RIDERS.

Upon being reported to the House by the committee on appropriations, the regular appropriation bills are put through their required readings and discussed by the House in committee of the whole. The House has a right to insert, strike out, increase, or decrease items at its discretion; but from the nature of things this right is not easy to exercise. A body of four hundred and thirty-five members cannot, as a practical matter, give detailed consideration to the long lists of figures contained in these measures. And, in any event, the dreary columns of digits do not afford much enlightenment or inspiration to debate. Few congressmen want to see appropriations reduced; on the other hand, they realize that if they begin increasing them, everyone will want to have a hand in it. Consequently the bills usually go through without a great deal of change from the committee's recommendations, although minor alterations are frequently made.

THE FINAL STAGES IN THE HOUSE.

Having passed the House, the various appropriation bills go to the Senate. There also they are referred to a committee on appropriations; but provision is made for adding to that committee three members from each of seven important legislative committees (e.g. foreign relations, agriculture, etc.) when matters affecting their special fields are being considered. Before this Senate committee on appropriations, anyone may appear and urge changes in the bills, so heads of departments, and others who have had their estimates reduced in the House, sometimes renew their importunities before the Senate committee. Even members of the lower chamber, who have failed to impress their own colleagues with the merits of their requests for appropriations, do not always hesitate to appear before the Senate committee and reiterate their arguments, although their efforts are not usually attended with much success.

APPROPRIATION BILLS IN THE SENATE.

When the bills are reported to the whole Senate, a few further changes in individual amounts are sometimes made. Then the appropriations are sent back to the House for concurrence, and if the House does not agree to the Senate's changes, they are referred to a committee of conference made up of selected senators and

APPROPRIATION BILLS IN CONFERENCE.

representatives. It is the function of this conference committee to adjust the items and get an appropriation bill into such shape that both the House and the Senate can agree on every word of it. Compromises are made here and there; the conferees report their agreements to their respective chambers, which finally pass the bill and send it to the President to be signed.

When an appropriation bill has been passed by Congress, the President has virtually no alternative but to accept it. He can veto the whole bill if he chooses to do so; but he cannot veto any individual items in it, leaving the rest to stand. To veto a whole appropriation bill is a very drastic step. Such action, unless the bill were passed over his veto, would leave important branches of administration without any funds until a new bill could be put through the various stages; and Congress might adjourn before that could be done. Consequently the President, as a rule, blurts out his objections to the offensive items and then signs the bill all the same. The result is that the presidential veto, as far as the spending of public money goes, is greatly weakened. This situation is embarrassing to the President and costly to the taxpayers. Public opinion holds the President responsible for all the items in any bill which he signs even though he may be strongly opposed to some of them.[1]

INFLUENCE OF THE PRESIDENT ON APPROPRIATIONS.

The national budget system is not yet in all respects what it ought to be, but its establishment marked a long step forward. The bureau of the budget has saved the country a great many millions, particularly by its careful investigation of departmental expenses and its constant discovery of ways in which the taxpayer's money may be saved. With an increased staff it would be able to do more in this direction. Nevertheless, the control of national expenditures in the United States is not yet strict enough. The director of the budget has been given the initiative in recommending appropriations, but neither he nor the President has the sole initiative. Congress does not regard the national budget system as having placed any limitations upon its own ultimate authority, either in proposing or sanctioning appropriations. The result is that complete responsibility belongs neither to the executive nor to the legislative branch of the government; it is divided between the two. The President may pledge economy, but unless he obtains the cooperation of Congress he cannot redeem his pledge. From time to time measures involving large expenditures have been passed against the President's recommendation and even over his veto —

THE CO-ORDINATORS.

[1] On the question whether the President ought to be given the power to veto individual items, see pp. 179–180.

because congressmen have considered such action politically advantageous to themselves.

THRIFT AS A NATIONAL VIRTUE.

Much unhappiness comes to individuals by reason of their lack of careful planning in money matters. The nation which tolerates similar incaution in its public finance will eventually get itself into trouble also. Thrift is a national, as well as a personal, virtue. We look at the national expenditures and say: "What are even forty billions a year to a hundred and thirty million people?" But a little mental arithmetic will disclose that it figures out to more than $300 per capita, or about a thousand dollars a year for the average American family. If every employed person in the United States, man or woman, were to give Uncle Sam a bright new dollar every day in the year, it would not cover the cost of the national government. Nor should it be forgotten that forty-eight states are also taking money from the citizen's pockets and spending it; so are a great host of counties, cities, towns, boroughs, townships, and local-improvement districts. There are at least fifty thousand taxing and spending authorities, big and little, in the United States. So the total cost of governing the American people is not merely a dollar a day for every person who is gainfully employed; it is a good deal more than that.

Of course the wage earner does not realize that he pays at that rate, or anything like it. He knows, to be sure, that his earnings go into rent, grocery bills, gas bills, street-car fares, as well as into payments for gasoline, tobacco, liquor, motionpicture shows, etc. — but not always does he realize that taxes, all kinds of taxes, are a component part of these payments, so that every time he unsheathes his pocketbook he pays taxes. He complains about the increased cost of living, but does he appreciate the fact that the reason for this, in part at least, is the increased cost of government? If he did, he would show more concern about public expenditures.

THE NATIONAL DEBT

PURPOSE OF THE BORROWING POWERS.

Not all national expenditures are defrayed out of income. Extraordinary undertakings which involve great outlays, such as the financing of a war or the relief of unemployment during an economic emergency, cannot be financed out of taxes alone. Governments, like individuals, should try to live within their incomes as a normal policy and should not borrow to meet their current needs. That is an axiom of financial policy on which all statesmen seem to be agreed, although they do not always observe it in practice. But from time to time there are situations which require the raising of

extraordinary sums — to build the Panama Canal, for example. To do this by greatly increasing the current taxes would be unjust as well as unpopular. Governments, like business corporations, should have the right to incur indebtedness for large capital expenditures; they are also justified in borrowing when serious emergencies arise, and no one can foretell how great such emergencies may be. The Constitution of the United States, therefore, gives to Congress, without any restriction, the right "to borrow money on the credit of the United States."

This is one of the few congressional powers upon which the Constitution places no limits whatsoever. Congress can borrow as much as it pleases and in whatever manner it deems expedient. There was a good reason in 1787 for giving Congress this latitude because the national credit was then so low that difficulty was likely to be encountered in borrowing on any terms. The new national government started its career with heavy obligations. Bonds had been issued during the Revolutionary War both by the confederation and by the several states. The former would certainly be a charge upon the new Union, and the latter would probably have to be taken over as a part of the national debt. As a matter of fact, they were taken over.

ABSENCE OF LIMITATIONS UPON IT.

BEGINNINGS OF THE NATIONAL DEBT.

The funding of these various obligations, which amounted in all to about $55,000,000, was the work of Alexander Hamilton, who served as secretary of the treasury during the years 1789–1795. To Hamilton also was due the beginnings of a system of federal revenues which not only provided for the ordinary expenses of government, but looked to the gradual extinction of the initial debt. During the War of 1812 some new bonds were issued, but twenty years after the close of this war the entire national debt had been virtually paid off. Not only that, but there was a surplus in the federal treasury which Congress distributed among the states! For twenty-five years, 1836–1861, the United States was the only great country in the world without a national debt of any consequence. Then came the Civil War; and, during the years 1861–1865, the debt rose to what was regarded as a staggering figure.

THE LEGACY OF THE REVOLUTIONARY WAR:

ALEXANDER HAMILTON'S WORK IN FUNDING IT.

At the close of the Civil War the interest-bearing indebtedness of the nation stood at about three billions of dollars; but this does not tell the whole story, for much borrowing had taken place in a roundabout way through the issue of paper currency. The financial legacy of the Civil War was steadily reduced, however, and during the next twenty years it was brought down to

THE CIVIL WAR DEBT.

about a billion and a half dollars. Then the pendulum began to swing once more in the other direction. In the second Cleveland administration bonds were issued to replenish the gold reserve in the treasury, and later, during the war with Spain, there were additional borrowings. The building of the Panama Canal added something to the total, yet the national debt on the eve of America's participation in the First World War was only about a billion and a quarter.

THE NATIONAL DEBT SINCE THE CIVIL WAR.

Viewed in the light of later developments this little billion of a generation ago now seems microscopic. The borrowings for the two war years 1917–1919 alone amounted to over twenty-five billions. About ten billions were loaned to the European countries which were associated with the United States in the war — notably to Great Britain, France, Italy, Russia, and Belgium. But presently the government began paying off these war bonds and made good progress until 1930, when the country began to feel the onset of the economic depression.[1] The total debt at that date had been reduced to about sixteen billion dollars. Then, with the policy of borrowing to finance the relief and recovery programs, the figures mounted rapidly again. By the end of the fiscal year 1939, the national debt had risen to about forty billions; two years later, the expenditures of the defense program had pushed it up nearly ten billions more; and with the active entry of the United States into the war the nation's indebtedness shot upwards at an unprecedented speed.[2] Having in mind the urgency of an all-out effort, Congress lifted the debt limit to astronomical figures — one hundred and twenty-five billions in 1942; two hundred and ten in 1943; and three hundred billions in 1944. Nor does this gigantic figure portray the real magnitude of the burden which governmental indebtedness has placed upon the American people, for the states also have debts, and so have the counties, cities, and towns. No one knows, with any degree of exactness, what the grand total now is.

ITS INCREASE IN WORLD WAR I AND SUBSEQUENT REDUCTION.

How great a burden of public debt can the people of any country bear? No precise answer can be given to this question, although it is self-evident that somewhere there must be a point at which governmental solvency will be endangered. The burden of a public debt depends on how much it costs to carry the load, in other words, upon the rate of interest which has to be paid on it.

WHAT IS THE TOP LIMIT?

[1] W. F. Willoughby, *Financial Condition and Operations of the National Government, 1921–1930* (Washington, 1931).

[2] The foregoing figures do not include obligations guaranteed by the United States, such as the bonds of the home owners' loan corporation, the farm loan bonds, the National Housing Act guarantees, etc.

And in the United States this rate has been coming down. It also depends upon the wealth and earnings of the people, because it is from this wealth and these earnings that the money to pay interest on the debt is obtained; and it is from this source also that public debts have to be paid off. The total earnings of the whole population of the United States amounted to over a hundred and fifty billions in the year 1945, so that the national debt limit represents the entire earnings of the people at the present high rate for two whole years.

THE MECHANISM OF BORROWING.

How does the national government "borrow money on the credit of the United States"? The most common plan is to issue bonds. These bonds are promises to pay on the expiration of a designated period, say, twenty, thirty, or forty years, with interest at a stated rate during the lifetime of the bond. For the most part these bonds have been sold to banks, insurance companies, custodians of trust funds, and similar concerns. But government bonds are also sold direct to private investors and, to facilitate such sales, they are available in small denominations. During recent years much use has been made of so-called savings bonds. Purchasers of these bonds do not receive interest at regular intervals: the interest is added to the face value of the bond — for example, a savings bond purchased for $750 will be worth $1000 in ten years.

TREASURY NOTES.

From time to time the United States has also borrowed money by the issue of treasury notes or bills. These are issued in varying denominations and mature within a short time, usually from three months to five years. These bear a very low rate of interest, much lower than is paid on government bonds which have a long maturity. Treasury notes and bills are purchased largely by banks and other financial institutions as a means of keeping their surplus cash invested without tying it up for a long period. The national government has also issued in recent years what are known as "tax anticipation notes." These are interest-bearing notes which corporations or individuals are permitted to buy and then turn in (at face value plus interest) in payment of their federal taxes.

BORROWING BY AN INFLATION OF THE CURRENCY.

Government borrowing by an inflation of the currency was extensively practiced in various countries of Continental Europe during the First World War and after it. There is nothing in the Constitution of the United States that prevents resort to the same practice by Congress. During the Civil War the national government paid a portion of its war expenditures by issuing "greenbacks," which were merely paper notes with no adequate reserve of gold or silver behind them, and its right to make this

money legal tender in payment of private debts was subsequently upheld by the courts.[1] During the Second World War there was also a vast increase in the amount of paper currency placed in circulation; but this time it was adequately backed by the nation's reserve of gold and silver.

In no case has there ever been a repudiation of the American national debt or any part of it. Repudiation of the debts owed by some of the individual states, however, has occurred on several occasions.[2] Where such action takes place, the holder of a repudiated bond has no effective legal redress. He cannot sue the state except in its own courts, and even there he has no status as a plaintiff unless the state gives it to him, which it is not likely to do. He cannot enter suit in the federal courts, because the eleventh amendment prohibits the federal courts from hearing any citizen's suit against a state.

REPUDIATION OF PUBLIC DEBTS.

The burden of a national debt may at times be lessened by the process known as refunding. The government, when bonds are issued, reserves the right to pay them off at or after a designated date. If at that date the general rate of interest has fallen, a government may then secure money to pay off the old bonds by issuing new bonds at the lower rate of interest. If the government, for example, borrows a billion dollars at four per cent on bonds which are to mature in twenty years, this does not mean that it must draw on its current income to pay off these bonds when the twenty years are up. It can, and probably will, "refund" these bonds by the issue of new ones, bearing a lower rate of interest, provided interest rates have gone down in the meantime. Thus, when interest rates are falling, it becomes possible to lessen the burden of a national debt without actually paying any of it off. On the other hand, if interest rates have gone up, the refunding operation becomes a costly one.

THE PRACTICE OF REFUNDING.

One sometimes hears it said that the average citizen does not need to worry about the national debt, whether it is big or little, because so many of the bonds are held by banks, insurance companies, large industrial corporations, and the like. But these concerns are merely acting for their depositors, policyholders, and shareholders who, taken together, constitute a large fraction of the whole people. When a wage earner puts

[1] See p. 424.

[2] Between 1840 and 1883 twelve states (all but two of them southern) repudiated obligations to an aggregate amount of more than $160,000,000. R. C. McGrane, *Foreign Bondholders and American State Debts* (New York, 1935). Defaults have occurred in eight other states, including California, Illinois, Indiana, and Pennsylvania. D. F. Jordan, *Investments* (New York, 1933).

money in a savings bank, or into payments on a life insurance policy, he is really buying government bonds, whether he knows it or not — because the bank or insurance company buys its government bonds with at least a part of his money. When a government becomes insolvent, therefore, almost every citizen is affected. Alexander Hamilton once said that "a national debt, if it be not excessive, will be to us a national blessing." That saying is often quoted by spendthrift politicians — but usually they leave out the qualifying clause.

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CHAPTER XXV

THE GOVERNMENT AND COMMERCE

The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares. — *Alexander Hamilton.*

The chaotic condition of trade during the years preceding 1787 did more than anything else to bring the states together. No sooner had the Revolutionary War come to a close than they began setting up tariffs against one another and seeking preferential trading arrangements with foreign countries. This commercial rivalry soon led to bad feeling and within a few years it became clear to everyone that orderly trade could not be maintained except by establishing a central authority to enforce uniform regulations. On this point the men who framed the Constitution were virtually unanimous.

COMMERCIAL CHAOS BEFORE THE FORMATION OF THE UNION.

The Constitution, therefore, gives Congress complete power to regulate commerce with foreign nations and among the several states — subject only to the proviso that such regulation shall not give to one state any preference over another, and that no export duties may be levied.[1] This "commerce clause" is deceptively simple on its face; in reality, it has become, in application to present-day business activities, more difficult to define than any other power bestowed upon Congress by the Constitution. No grant of authority to the federal government has been of greater elasticity than that which is embodied in the phrase "to regulate commerce." These three words, as interpreted by the courts, have contained enough latent authority to make Congress a dominating force in the industrial life of the nation.

WHAT THE CONSTITUTION GIVES TO CONGRESS IN THE WAY OF POWERS OVER COMMERCE.

[1] The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. (Article I, Section 8.)

No tax or duty shall be laid on articles exported from any state. (Article I, Section 9.)

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another. (Article I, Section 9.)

Obviously no member of the constitutional convention could have had any idea of the vast possibilities which lay concealed in this simple phrase, nor did its full import begin to be realized until a generation after the Union was established. The decision of the Supreme Court in the case of Gibbons *v.* Ogden (1824) first brought home to the states the extent of the jurisdiction which they had handed over to Congress, and from that time forward the commerce clause has been steadily widened by the inclusion of one thing after another.[1] In a hundred and fifty-seven years it has moved all the way from pack-horse to airplane and from post-rider to radio.

THE FIRST LANDMARK IN THIS EXPANSION: GIBBONS *v.* OGDEN (1824).

Words are the mind's ambassadors. When used in a constitution they have dynamic properties. Their shadings keep step with social and economic changes; they expand to cover the necessities of each new age; they signify one thing in this generation and another in the next. Commerce in 1787 was a matter of stagecoach and sailing ship. But when railroads and steamships came, they were held to be instrumentalities of commerce. Then the telegraph arrived and was put into the same category. The telephone followed it there. So did the broadcasting stations, in due course. Meanwhile, the courts were busy deciding that express companies, Pullman car companies, electric trolleys, auto stages, airplanes, pipe lines, and a dozen other carriers of trade and intercourse belonged within the same elastic designation. Constitutional terminology is not made of vanadium steel; it has the resiliency of a toy balloon.

AN EXAMPLE OF VERBAL ELASTICITY.

THE COMMERCE POWER IN GENERAL

What is "commerce" today? No one can define it precisely; and, in any event, a definition of today would be out of date even a few years hence. But in a general way commerce includes all forms of transportation on land, by water, or through the air, the movement of persons, merchandise, and messages — in fact, economic intercourse of almost every sort. But there are some specific things which it does not cover. Traffic in bills of exchange, for example, has been held to be outside the scope of the term. A baseball team playing games in different states is not engaged in interstate commerce, but a high-tension power line carrying electric current across a state boundary comes under the commerce power of

EXACT DEFINITION OF THE COMMERCE POWER IS IMPOSSIBLE.

[1] In Gibbons *v.* Ogden (9 Wheaton 1) it was held that Congress had power to maintain the free flow of foreign and interstate commerce, even within the boundaries of the individual states themselves.

Congress. The line of demarcation is sometimes so tortuous that the average layman cannot follow it. Several years ago, a federal court held that a law passed by Congress for the protection of migratory birds was unconstitutional because bird migrations are not commercial activities.[1] But the passing motorist who picks up a hitchhiker and carries him across the boundary of a state has been held, by judicial ruling, to be a carrier of interstate commerce. More than three quarters of a century ago the Supreme Court held that the buying and selling of fire insurance policies was not interstate commerce, but quite recently it reversed itself on this point.[2]

THE LINE BETWEEN COMMERCE AND INDUSTRY.

For a long time it was the judgment of the Supreme Court that the power of the national government to regulate interstate commerce gave it no authority over manufacturing, mining, oil production, and other business which was considered wholly within the bounds of a single state. Even as late as 1895 the Court held categorically that manufacturing is not commerce but is "antecedent to commerce." [3] And in the Schechter Case (1935) it still held to this general ruling.[4] But, in more recent years, a change of judicial attitude on this matter has developed; and, in various decisions since 1937, the Supreme Court has held that the commerce clause may be used by Congress to regulate industries within a single state when such industries are, from the nature of their business, closely interwoven with other industries which operate in interstate commerce. The National Labor Relations Act, for example, has extended its provisions to workers in such industries and has been upheld in doing so. The rigidity with which Congress was debarred for over a century from regulating purely local business is being broken down.[5]

THE FAR-FLUNG BOUNDARIES OF THE COMMERCE POWER.

Commerce is commerce, no matter how it is carried on. The method of transportation is immaterial. Nor is it necessary that the carrying be for profit. The presence or absence of buying or selling, profit or loss, payment or gift, does not affect the fundamental principle. The radio broadcaster, though he may never move from one spot, is engaged in interstate commerce. What he usually sends through the air is a medley of adver-

[1] U. S. *v.* Shauver, 214 Fed. 154. In 1916, however, the United States and Canada entered into a treaty providing for specified closed seasons and other forms of protection with respect to certain species of wild birds in their annual migrations, and in 1918 Congress enacted the Migratory Bird Treaty Act (39 Stat. 1702) to implement the provisions of this treaty. The Supreme Court held this act of Congress to be constitutional as a necessary and proper means of giving effect to a treaty which was within the authority of the United States to conclude. Missouri *v.* Holland, 252 U. S. 416 (1920).

[2] Paul *v.* Virginia, 8 Wallace 168 (1868), and U. S. *v.* South-Eastern Underwriters Association, 322 U. S. 533 (1944).

[3] E. C. Knight Co. *v.* U. S., 156 U. S. 1 (1895). [4] See p. 445. [5] See p. 450.

tising and entertainment. The law calls it commerce. But the mere fact that you use the mails from one state to another in the course of a business transaction does not necessarily involve you in interstate commerce — for example, if you are a lawyer and give your client in another state legal advice by mail, charging a fee for it.

WHEN COMMERCE BECOMES "INTERSTATE."

Another question arises. At what point does commerce become interstate? Commerce which begins and ends within the bounds of a single state is prima facie outside the category of interstate commerce; but, if at any point between its start and its destination, the traffic passes outside the state boundary, no matter for how short a distance, the whole transaction goes under federal jurisdiction. Goods shipped from Boston to New York are under federal regulation all the way from one place to the other, not merely while crossing the intervening states. But goods shipped from Los Angeles to San Francisco, a longer distance, are ordinarily under state regulation. Interstate commerce begins when the person or shipment with an interstate destination goes aboard the carrier. However, in an interesting case a generation ago, it was held that taxicabs owned and operated by a railroad company in carrying passengers to its terminal were not engaged in interstate commerce — in other words, that passengers began their interstate trips when they actually boarded the train, and not when they taxied to the station.[1]

Therefore, the only way to keep goods from coming under the jurisdiction of Congress is to keep them at home, in the state where they are produced. Under present-day conditions of industry such a recourse is virtually impossible. Of late, the courts have shown full awareness of the complexity of commerce and the inextricable mingling of its various parts. Every large concern ships goods by express, freight train, motor truck, or airplane into other states. It brings raw material by the same channels. The level of wages and the schedule of work hours in one state are bound to affect commerce between it and other states. Electric power that is produced within one state is used locally to manufacture goods which are sold in other states. As a practical matter, it is extremely difficult, if not impossible, to make a clean-cut, open-and-shut differentiation between interstate and intrastate commerce, or even between commerce and industry. The courts are now recognizing that fact. The result is a gradual extension of federal jurisdiction over both commerce and industry of all kinds. Incidentally, it may be mentioned that a consignment of merchandise which has been shipped in interstate com-

[1] Pennsylvania R.R. Co. *v.* Knight, 192 U. S. 21 (1904).

merce remains subject to federal jurisdiction until it is sold in the original package or until this original package is broken.[1]

Is the power of Congress over foreign and interstate commerce unlimited? By no means. As already stated, when Congress undertakes to regulate commerce, it must do so uniformly. It cannot discriminate in favor of one section of the country, or in favor of one part of the population, as against any other. If it imposes duties upon imports coming into the United States from foreign lands, those duties must be levied at the same rate at all ports to which the goods may come. So long as it observes the rule of uniformity, however, Congress may determine the conditions under which its commerce power is exercised. It may regulate to the extent of placing an embargo on all foreign trade and may regulate commerce between the states to the extent of actually prohibiting certain forms of it.

LIMITATIONS ON THE POWER OF CONGRESS TO REGULATE FOREIGN COMMERCE.

THE TARIFF

The power to regulate commerce with foreign nations has been exercised, in the main, by the enactment of tariff laws. Strictly speaking, a tariff *for revenue* is an exercise of the taxing power, while a tariff *for protection* falls within the scope of the commerce power. The distinction is of no legal importance, however, for virtually every American tariff during the past century has been both fiscal and protective.[2] Usually the element of protection has predominated, and that is why the customs tariff is included in a chapter on the regulation of commerce rather than under the heading of national taxation.

THE TARIFF AS AN INSTRUMENT OF COMMERCIAL REGULATION.

In the days when the Constitution was being framed the prevailing public sentiment leaned towards free trade. But Alexander Hamilton persuaded the first Congress to establish a tariff of duties on imports.

[1] The original package doctrine was formulated by Chief Justice Marshall in 1827 (Brown *v.* Maryland, 12 Wheaton 419). It has been restated and made more precise in various later decisions, such as Leisy *v.* Hardin (135 U. S. 100, 1890) and Austin *v.* Tennessee (179 U. S. 343, 1900). A state may tax goods while they remain in the original package, provided that the tax is not special or discriminatory. But, when the goods have been imported from a foreign country, the consent of Congress is necessary under Article I, Section 10, of the Constitution.

[2] Until 1928 the Supreme Court was not called upon to determine the constitutionality of a protective, as against a revenue, tariff. Yet the issue had been debated in Congress and elsewhere for a hundred and forty years; and Democratic platforms, in 1892 and 1912, had denounced protection as beyond the constitutional power of Congress to establish. The decision of the Court in Hampton *v.* United States (276 U. S. 394) made no reference to the commerce power. It rested on two points: (1) actual practice from the time of Hamilton, and (2) the sufficiency of an alleged motive to raise revenue, no matter what other motives may have been influential.

This action was taken primarily to furnish the new government with revenue, but Hamilton believed in a customs tariff for other reasons as well. He argued that protection would build up the home market and weld the nation together; likewise, that it would cause the occupations of the people to become diversified by stimulating a variety of manufactures. In addition, it would foster shipbuilding and other activities, which in time of emergency could be utilized for the national defense.

NINETEENTH-CENTURY TARIFFS.

During the nineteenth century the tariff alternated up and down, but its general course inclined upward, especially after the Civil War. In the campaign of 1884 it became a leading issue between the major parties and remained one for forty years. The Republicans ranged themselves definitely on the side of protection. The Democrats denounced it as fraud and robbery, and in 1892 even went so far as to deny the constitutional power of Congress to enact it. As soon as they won control over Congress, they proceeded, although cautiously, to reduce the customs rates. Not until the campaign of 1928 did they abandon their demand for a "revenue" tariff. So both parties have now become frankly protectionist, and consequently the tariff has ceased (for the moment at least) to be a major party issue. Its schedules are nowadays evolved from a series of struggles in Congress among different sections of the country and among different business interests. Lobbyists crowd into the capitol by the hundreds whenever a new tariff is in the making — every one of them seeking some concessions to the special interest or locality that he represents. Every sort of business (agriculture included) clamors for "protection"; but what most of them really want is a rate of customs duty that will give them a substantial advantage over any foreign producer of the same products, or even of products which might compete with their own. And usually they get at least a part of what they are after. The result has been a higher scale of prices in the United States than in other countries, higher wages in the protected industries, and higher profits in them also. By most Americans the protective tariff has been given a share of the credit for the relatively high standard of living in the United States.

THE "FLEXIBLE CLAUSE."

After the World War of 1914–1918 the situation of the United States with reference to foreign commerce and competition underwent a change. Foreign currencies, in terms of the American dollar, depreciated considerably. This meant that goods could be sent to the United States, and, even after payment of the regular customs duty, could be sold cheaply for American dollars, because these dollars would bring a high price in the currency of the exporting country. To meet this situation, Congress inserted in the tariff

acts of 1922 and 1930 a "flexible clause" which permits the regular rate of import duty on any commodity to be raised or lowered within certain limits by presidential proclamation whenever it is decided that such adjustment is essential to fulfill the purposes of the tariff.

RECIPROCAL TRADE PROVISIONS.

On the urgent recommendation of the Secretary of State, Cordell Hull, Congress inaugurated in 1934 the policy of permitting reciprocal trade agreements between the United States and other countries. The advocates of this policy hoped to secure mutual benefits through the removal of obstructions to foreign trade. Without the advice and consent of the Senate, the President was empowered to make such agreements with other countries, but with the provision that no rate of duty should be lowered more than 50 per cent; that no article should be shifted from the dutiable to the free list; that the reduced rates should apply to all countries not discriminating against American goods; and that, at the end of three years, the agreements might be terminated upon six months' notice. By successive reenactments of this measure, Congress has extended the life of this policy and it still continues to be in force. The department of state, which negotiates the reciprocal agreements, is now concerned with the postwar application of this arrangement, which, being flexible, could be adjusted to changes in the value of currencies or to new conditions of trade. By some statesmen the reciprocal trade agreement is regarded as an agency of international peace. At any rate, the United States has entered into reciprocal trade agreements with more than twenty-five countries.

THE "QUOTA" SYSTEM.

The outbreak of another great European war in 1939 relegated the tariff to a very subordinate place in public discussion. For some years before this date various European countries had been placing their foreign trade on a "quota" basis. In other words, they no longer allowed imports with only their tariffs as a barrier. Instead they permitted, from any country, only such imports as could be balanced by a quota of exports to the same country.

THE STOPPAGE OF TRADE WITH BELLIGERENTS.

Meanwhile some localized wars had begun — Italy against Ethiopia, Japan against China. The conflagration threatened to become general and possibly involve the United States. Supported by popular sentiment, Congress therefore passed, during the years 1935–1939, four so-called Neutrality Acts which provided that whenever Congress or the President formally recognized the existence of any war, all trade between the United States and the warring countries should go upon a "cash-and-carry basis." In other words, the United States would furnish neither ships nor credit. In addition, these acts made stringent rules relating to the sale of

munitions to belligerents, the floating of loans by them in the United States, and the traveling of American citizens on ships owned by them.

But the startling success of German arms during 1940 and the apparently desperate situation of Great Britain dictated a departure from this policy. Congress, in March, 1941, enacted a Lend-Lease Act which provided for the giving of assistance in the way of munitions, supplies, ships, and money to those countries which were resisting the aggression of the Axis powers. This, of course, soon resulted in an enormous flow of commerce, mainly in one direction. By such action the United States began to throw its weight against the Axis and, within a year, was wholeheartedly in the war.

IMMIGRATION

The control of immigration is another important phase of the commerce power.[1] By virtue of its authority to regulate foreign commerce, Congress has passed numerous laws relating to the incoming of aliens. These laws prescribe the conditions under which immigrants may enter the United States and exclude some classes of aliens altogether. For example, the federal laws exclude all persons, except those engaged in the various professions, who come to the United States to perform labor under contracts made before their arrival. They also prohibit, with some exceptions, the entry of certain Orientals. A literacy test has been provided since 1917 for all otherwise eligible immigrants. It requires ability to read some language, not necessarily English. Among those excluded under all circumstances are insane persons, and persons likely to become public burdens, or those afflicted with serious physical or mental ailments, as well as polygamists, anarchists, and persons who have been convicted of serious crimes. All aliens who are admitted must pay a head tax.

THE CONTROL OF CONGRESS OVER IMMIGRATION.

WHO ARE EXCLUDED.

After the close of the First World War, it seemed certain that an avalanche of immigration would descend upon America. From almost everywhere, throughout Continental Europe, the stream started to flow across the Atlantic.[2] So Congress busied itself with the preparation of measures which were expected to stem the tide. After an unsatisfactory experiment with stopgap arrangements it authorized, in 1924, a "national-

THE ACT OF 1924 AUTHORIZES NATIONAL-ORIGINS BASIS.

[1] Strictly speaking, this control (which is exclusive) is a necessary consequence of the power of the national government to conduct foreign relations and to regulate commerce. Passenger Cases, 7 Howard 783 (1848).

[2] By fiscal years the immigration was 430,000 in 1920; 805,000 in 1921; 310,000 in 1922; 523,000 in 1923; and 707,000 in 1924.

origins" system of quotas, which was put into operation five years later. Under the terms of this law the total number of immigrants admitted into the United States (except residents of the Western Hemisphere, to whom the restriction does not apply) is limited to 154,000 per annum. Within this limit quotas are assigned to the various countries in proportion to the number of persons of such origin who were already in the United States at the time of the census of 1920.[1] On this basis, Great Britain and Northern Ireland received a quota of about 66,000; Germany, about 26,000; and Italy, about 6,000. For a time, there was strong pressure on the quotas in some European countries; but, with the growth of the economic depression in this country and the outbreak of war in Europe, the flow of immigration declined sharply.[2] The minimum of any nationality is not to be less than one hundred, except in the case of persons ineligible to naturalization, such as Japanese and Hindus, who are excluded altogether.

DEPORTATIONS.

Congress may regulate not only the admission but the deportation or expulsion of aliens. Accordingly, it has authorized the commissioner of immigration to deport, even after lawful admission, any alien who tries to foment revolution, or to spread subversive political doctrines, or who is convicted of certain crimes. And, of course, anyone whose entry into the United States is shown to have been unlawful can also be deported. Such deportees are sent back to their own countries. Deportation orders are issued by the executive authorities, not by the courts; but from such orders there is a right of appeal to the courts. Ordinarily, however, the courts will not interfere unless the facts alleged as the basis of a deportation order are unsupported by any substantial evidence.[3] The burden of proof rests on those who resist deportation, not on those who order it.

[1] According to the act of 1924: "Such determination shall not be made by tracing the ancestors or descendants of particular individuals, but shall be based upon statistics of immigration and emigration, together with rates of increase of population shown by successive decennial United States censuses, and such other data as may be found to be reliable." As to the methods that were employed, see Charles P. Howland, *Survey of American Foreign Relations* (1929), pp. 460–475.

[2] The figures are:

1933	23,068	1938	67,895
1934	29,470	1939	82,998
1935	34,956	1940	70,756
1936	36,329	1941	51,776
1937	50,244	1942	28,981

[3] In June, 1945, for example, the Supreme Court nullified an order for the deportation of Harry Bridges, West Coast labor leader, who is a native of Australia. In a 5–3 decision, the court declared that the deportation warrant was based on a misconstruction of the law and an "unfair hearing on the question of his [Bridges'] membership in the Communist party."

REGULATION OF TRANSPORTATION

It is chiefly by means of the tariff and the immigration laws that Congress has exercised its power to regulate commerce with foreign nations.

METHODS OF REGULATING INTERSTATE COMMERCE.

But Congress also regulates commerce among the states, and its work in this latter field has been even more important. Its regulatory power has been extended to ships on inland waters, railroads, electric railways, bus and truck lines, airplanes, oil-carrying pipe lines, transmission lines for electric light and power, whenever any of the foregoing operate in more than one state, as well as to communication by telegraph, telephone, and the radio.

For a long time after the federal government began its operations, Congress hardly used its power to regulate interstate commerce. In general, all such commerce went unregulated. During the middle decades of the nineteenth century, the railroads came and gradually spread themselves all over the country. The states, having chartered the railroad companies, were supposed to regulate them; but this arrangement proved ineffective, especially as regards through traffic. Many abuses developed in the way of discriminations in favor of certain cities as against others, or in favor of large shippers as against smaller ones. Sometimes these favored shippers were given rebates from the rates fixed in the published schedules.

Such abuses became so common and so flagrant that Congress decided to put an end to them. In 1887 the Interstate Commerce Act laid down a series of regulations which prohibited discrimination in rates or service. They also forbade rebating and the practice of "pooling" business, to which the railroads had frequently resorted. This, and subsequent statutes, established the principle that railway rates must be reasonable and must be publicly announced, after which they must not be raised without the approval of the interstate commerce commission, a body which was established in 1887 to enforce the various regulations.

THE INTERSTATE COMMERCE ACT OF 1887 AND SUBSEQUENT ACTS.

The functions of the interstate commerce commission have gradually been widened to include the carrying out of the federal laws relating to steamship and railroad companies, express and sleeping-car companies, motor bus and motor truck concerns, power transmission lines, and oil pipe-line companies, when engaged in interstate commerce. Its jurisdiction also extends to terminal facilities when used in connection with foreign or interstate trade. The commission may investigate, either upon complaint made to

WORK OF THE INTERSTATE COMMERCE COMMISSION.

it or on its own initiative, any allegations of overcharge, or faulty service, or discrimination in rates made by all such companies. It is authorized, after proper hearings, to fix the maximum rates or fares, and also to make reasonable rules as to the character of the service. It has various other responsibilities with respect to the issue of securities by carrier corporations engaged in interstate commerce.

THE DIVISION OF AUTHORITY OVER COMMERCE BETWEEN FEDERAL AND STATE GOVERNMENTS.

Meanwhile, it should again be pointed out, even at the risk of undue repetition, that the interstate commerce commission has no general authority over carriers which keep strictly within the bounds of a single state. As far as they are concerned, each state provides its own regulations and its own regulating body, commonly known as a railroad commission or public service board. But nearly all railroads now operate in more than a single state (or are parts of a railway system which does); and the interstate commerce commission has some jurisdiction over even their local rates insofar as these affect the general rate structure. The state commissions still have a good deal to do with such matters as the hearing of complaints, train schedules, local facilities, safety requirements, the abolition of grade crossings, etc.

FEDERAL OPERATION OF THE RAILROADS IN WARTIME.

During the First World War the President of the United States, by virtue of war powers conferred upon him by Congress, took over the operation of the important railroads, placing them under a director general named by himself. Congress subsequently provided that the owners of the railroads should be compensated during the period of federal operation by a guarantee of a net income equal to the average net earnings of the three preceding years. For more than a year after the end of hostilities, the national government continued to operate the railroads under this arrangement; but, in 1920, Congress passed the Transportation Act under the provisions of which the railroads were restored to private operation.

THE TRANSPORTATION ACT OF 1920: ITS CHIEF PROVISIONS.

This act embodied some novel features. For one thing, it sought to provide the railroads in each region of the country (taken as a whole) with a reasonable minimum of net earnings. Excess earnings by any one road were made subject to "recapture," that is, they were to go into a fund for the benefit of the less profitable roads. Much was expected of this recapture provision; but it proved unworkable and was repealed. A second provision authorized the interstate commerce commission to fix minimum as well as maximum rates to prevent unprofitable competition, while a third set up a plan for the adjustment of railroad labor disputes.

Finally, the act provided arrangements for the consolidation of all the railroads into a limited number of great systems; but virtually nothing came of this plan.

THE RAILROADS IN THE DEPRESSION.

With the onset of the economic depression in 1930 the traffic on the railroads underwent a rapid and severe decline. Earnings fell off correspondingly.[1] In no region of the country were they sufficient to produce the fair return on valuations which the act of 1920 contemplated. A general increase in rates, it was felt, would only result in a further decrease of business and not solve the problem. To make matters worse, many railroads found that they could not meet maturing obligations and, in some cases, they defaulted the interest on their bonds.

THE FEDERAL COORDINATOR.

To ameliorate this situation, two steps were taken. The reconstruction finance corporation made large loans of government money to the most needy railroads, taking such security for these loans as it was able to obtain. Likewise, Congress made provision (during the years 1933–1936) for a federal coordinator of transportation, appointed by the President, with the duty of promoting or requiring economies, eliminating wasteful duplication of services and facilities, securing financial reorganizations, and recommending other measures for improving the stability of the railroads. A significant limitation, however, was the requirement that economies in railroad operation must not be effected by reducing the number of employees.

POLICIES OF THE NEW DEAL.

Federal supervision of the railroads then developed some new features. It began to display a more active concern for the interests of the organized employees, as in the matter of wage adjustments; it became more favorable to shippers, especially to the shippers of farm products; it showed less sympathy toward investors in railroad securities; and it frowned upon the practice, long-established but costly, of putting insolvent railroads under judge-appointed receivers. Yet in 1938 over thirty per cent of all American railroad mileage was in the hands of receivers. The Transportation Act of 1940 was designed to relieve this situation. Among other things it removed certain restrictions from the lending powers of the reconstruction finance corporation; gave the interstate commerce commission authority to regulate the services and rates of water carriers in domestic commerce; permitted railroads to consolidate, apart from any official

[1] Within two years the total operating revenues declined by 50 per cent; the number of employees by almost 40 per cent. In the face of chronic deficits the credit of the railroads virtually disappeared. For the calendar year 1932 the railway brotherhoods accepted a 10 per cent cut in wages.

plan, with the consent of the commission; and created a three-man board to investigate the relative efficiency of rail, water, and motor transportation, with a view to discouraging wasteful competition.

THE PRESENT SITUATION.

From no regulation at all sixty years ago, we have now developed plenty of railroad regulation by the interstate commerce commission, by forty-eight state boards, and a board for the District of Columbia. While the railroads of the United States are ostensibly managed by their private owners, that is, by officials and directors chosen by the stockholders of the railroads, nearly all important questions of railroad policy and management are now settled by the public authorities. Those who own the railroads, and those who manage them for the owners, do not decide what rates shall be charged, what wages paid, what trains run, how many hours a trainman shall work, what his pension rights shall be, or how the railroad's accounts shall be kept. All such matters are covered by laws or regulations.

COMPETITION BY MOTOR CARRIERS.

The initial reason for this policy lay in the fact that railroads are public utilities, "clothed with a public interest" as the courts have sometimes said, yet often enjoying a monopoly. As regards their local traffic, most of the railroads encountered no competition at all for a long time. But during the twenty-odd years which intervened between the two World Wars, this situation underwent a great change. Motor trucks began to cut into the freight business of the railroads, while motor busses went out to capture a share of their passenger traffic. Both of them gradually extended their operations over longer distances and proved themselves successful competitors, because they enjoyed some marked advantages over the railroads. Motor vehicles have no expensive rights of way to maintain, require no costly terminals, freight yards, or passenger stations. They can pick up their loads at any point and deliver them to the consignee's door. At the outset, they were under virtually no official regulation as to quality or regularity of service, rates or fares, hours of labor, or minimum wages. The states required them to be licensed and to observe a few safety rules, but that was all.

CONGRESS INTERVENES, 1935.

The railroad managements complained loudly that this competition was unfair and uneconomic, but not until 1935 was Congress ready to provide for nation-wide regulation of the new carrier service. By a statute which was passed in that year, the interstate commerce commission received regulatory power over all motor carriers engaged in interstate commerce. This power includes the regulation of rates and service. Naturally the act of 1935

greatly increased the work of the interstate commerce commission, for the number of companies engaged in transportation by motor cars and trucks across state lines is very large — running into the tens of thousands. To handle the additional work, a bureau of motor carriers was established within the interstate commerce commission and the country has been divided into sixteen districts with a representative of this bureau stationed in each.

Meanwhile, in the years which followed the close of the First World War, a new agency of transportation developed rapidly. Commercial aviation, with the carrying of mail, passengers, and goods over long distances grew to such importance that, in 1926, Congress undertook to provide for the regulation of interstate airplane traffic. Later changes in the laws, together with various administrative reorganizations, have resulted in the present regulatory authorities — a civil aeronautics administrator and civil aeronautics board of five members, all of whom are appointed by the President. Both are in the department of commerce, but the board is given certain powers which are exercised independently.

CIVIL AERONAUTICS ADMINISTRATION.

The administrator of civil aeronautics has general supervision over traffic moving in air commerce, the enforcement of safety regulations made by the civil aeronautics board, the training of civilian pilots, the construction and improvement of government airports, and the promotion of experimental work in aircraft design. The civil aeronautics board grants (and revokes) permits for aircraft operation, determines the routes, licenses planes and pilots, regulates the rates charged by commercial aviation companies for the carrying of persons and property, prescribes the rates of compensation for carrying mail, makes the safety regulations, investigates aircraft accidents, and performs various other functions. In addition, the civil aeronautics authorities allocate the funds which are provided by Congress for subsidizing commercial air lines as well as for creating emergency landing fields, lighting and marking airways, and furnishing a radio directional service.

ITS ACTIVITIES.

Prior to 1934 the regulation of interstate telephone and telegraph and of trans-oceanic cable companies was entrusted to the interstate commerce commission. But radio broadcasting was under the supervision of another agency, the federal radio commission. This division of control over interstate communication facilities seemed inadvisable, so it has now been ended. Unified responsibility for regulating all of them has been vested in a new agency — the federal communications commission, a board of seven members ap-

ELECTRICAL TRANSMISSION.

pointed by the President with the consent of the Senate. This body regulates the rates and conditions of service in the case of interstate telegraph and telephone messages, grants permits for the operation of radio broadcasting stations, assigns the wave lengths to be used, and is responsible for insuring that the stations are "operated in the public interest."

CONTROL OF RADIO.

Since permits or licenses are granted for relatively short terms and have to be renewed, the commission is able to enforce its requirement that stations be operated in the public interest. For example, it has laid down the rule that every station must devote a certain minimum percentage of its broadcasting time to "sustaining" or educational programs, not of a commercial character. In general, the federal communications commission has no power of censorship over individual programs, except that its rules prohibit the broadcasting of programs which fall below reasonable standards of decency. This limitation on the scope of governmental control has been considered advisable in order that the radio may not be forced into a position of subservience to any political party or cause. Retention of its independence as an agency of public education is obviously desirable. On the other hand, the commission has been concerned to prevent the monopolizing of radio facilities by too small a number of nation-wide broadcasting chains. Likewise, it has been averse to the ownership of radio stations by newspapers, and in a number of cases it has compelled a separation of the two.

IT INVOLVES DIFFICULT PROBLEMS.

The radio, as everyone knows, has become a powerful agency for political, educational, and commercial propaganda. As a means of informing (or misinforming) the public it shares a place with the newspapers and probably exceeds the latter in its range. As a result of various improvements made just before and during the war, moreover, it is likely that television will become increasingly common and radio will consequently acquire even greater significance as a molder of opinion. Clearly it is desirable that this great instrument of indoctrination should not be subjected to complete control by any one governmental authority, lest it be utilized to serve the interests of the party in power. To that end, the programs should be free from anything that approaches official censorship. On the other hand, there are few who will deny that these programs, taking them as a whole, do not represent a very high standard of quality or good taste. The desirability of such regulation as will conduce to their improvement is fairly apparent. The problem is to find a middle course between censorship and no regulation at all.

THE CONTROL OF LIGHT, POWER, AND WATER COMPANIES

During the past fifty years there has been a great development in the field of public utilities. Gas, electric lighting, and power companies have been organized to provide services for even the smallest communities. In the earlier stages of this development a great many small concerns were organized, each supplying the needs of its own neighborhood. But it was soon found that light and power could be produced more cheaply on a large scale, so the process of consolidating the little companies into big ones by purchasing them outright began. This consolidation, however, was unpopular with the public because it seemed to result in the creating of large monopolistic corporations; and it was frowned upon by state legislatures as well as by regulating commissions in the states. Accordingly, a new device known as the holding company developed. Under this arrangement a new corporation was organized with the sole purpose of buying and holding stock in the smaller companies. The latter continued to operate their local plants, but were supervised and controlled by the holding company which owned the stock.

OPERATING COMPANIES AND HOLDING COMPANIES.

This system had some economic advantages. It permitted local management of public utility plants to continue while providing centralized financial backing and technical assistance. It stimulated small plants to improve their efficiency and, hence, their earnings. On the other hand, the holding company plan led to serious abuses. Such companies have no physical assets as a rule, but merely own the stock of smaller operating concerns. They sell to the public shares of their own stock based upon this ownership of other stock. In this process an unwarranted overissue of stock frequently resulted. Having control of the operating companies, moreover, the holding company could force the former into improvident actions for its own benefit, thus milking the smaller concerns in order to pay higher dividends upon the stock of the holding concern. Holding companies chartered in one state, again, have frequently acquired the stock of operating companies in other states, thus rendering state control of the whole financial structure virtually impossible.

THE PROBLEM WHICH RESULTED.

During the era of speculation, 1922–1929, an enormous amount of holding company stock was marketed to the investing public at high prices on the basis of fictitious earnings; then, when the business recession came, the values which were thought to be represented by these investments dwindled in many cases to a small fraction. Thereupon a wave of resentment against the holding company system swept over the country with loud demands for a congressional investigation.

Out of the investigation, which disclosed a series of grave abuses, came the Public Utility Holding Company Act of 1935. After defining such a company as one "which directly or indirectly owns, controls, or holds, with power to vote, ten per cent or more of the outstanding voting securities of a public utility company," this law requires that all holding companies shall be registered with the federal securities and exchange commission.[1] If they fail to do so, they are forbidden to sell their securities in interstate commerce or make use of the mails in connection with their business. In order to be registered with the commission, each holding company must file elaborate information covering all matters relating to its organization and activities; it must also conform to various requirements set forth in the law and must continue such conformance under penalty of having its registration revoked. Strict rules relating to the issue of holding company securities are provided, and it is the commission's function to see that these are enforced. Likewise, it is the duty of the commission to examine the structure and activities of every registered holding company in order to determine whether these can be simplified. The commission has the power to require such simplification, even to the extent of virtually eliminating those holding companies which seem to be unnecessary to the operations of an integrated public utility system. This last-named provision has become popularly known as the "death sentence" power of the commission. Since 1935 it has been applied to many holding companies. They have been required to "unscramble their holdings," as the saying goes.

THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

Various powers relating to companies which do an interstate business but are not "holding companies" have also been given to the securities and exchange commission. For example, the commission is empowered to compel a full and fair disclosure of all the material facts relating to securities which are publicly offered and sold in interstate commerce or through the use of the mails. Before such securities can be offered for sale, they must be registered with the commission and approved by it. Such approval does not imply, of course, that the commission necessarily regards the securities as sound investments. Those who buy approved securities do so at their own risk. They are merely assured that full information concerning what they are purchasing has been given to them.[2]

The foregoing paragraphs refer to the financial affairs of public utility companies which do business in more than one state. As respects

[1] See pp. 238–239.

[2] For details concerning other functions of the S E C see the latest issue of the *U. S. Government Manual*.

the control of rates, services, and corporate practices, the Federal Power Act of 1935 extended the functions of the federal power commission, which had been established fifteen years previously. This body now consists of a chairman, vice-chairman, and three commissioners appointed by the President. It has general supervision over power developments on navigable streams, or upon public lands, or which affect the interests of either foreign or interstate commerce. This includes the interstate transmission of gas and electricity. More recently the commission has been given authority to undertake a large power-development program in the interest of national defense. It has become the federal government's chief agent in the expanding national control over the power resources of the United States.

CONTROL OF WATER POWER.

PROMOTIONAL ACTIVITIES

What has been said in the foregoing pages relates chiefly to the regulatory work of the national government in the domain of foreign and interstate commerce. But not all the work of the federal authorities in this field is of a regulatory character. Much of it is promotional and constructive. It aims to develop and expand the commerce of the United States both at home and abroad. It is concerned, for example, with the development of the American merchant marine and the provision of adequate aids to navigation; the exploitation of foreign markets; the compilation of trade statistics for the information of importers and exporters; the encouragement of air transportation; and the establishment of landing fields.

THE PROMOTION OF COMMERCE.

The Constitution of the United States not only grants Congress power to regulate foreign and interstate commerce, but it likewise declares that the judicial power of the national government shall extend to "all cases of admiralty and maritime jurisdiction." [1] Because of this latter provision the Supreme Court has held that the paramount authority of the federal government does not depend upon the question of whether a vessel is engaged in foreign or interstate commerce, but extends to all voyages which are maritime in character and on navigable waters, even if made wholly within a single state — for example, a voyage between Rochester and Buffalo or between Cleveland and Toledo.[2] All navigable waters within the United States are under federal control and Congress has given much attention to the improvement of rivers, lakes, and harbors, in order that commerce may be facilitated. On many

NATIONAL CONTROL OF ALL NAVIGABLE WATERS.

[1] Article III, Section 2.

[2] The Lottawanna, 21 Wallace 558 (1874).

occasions, a "rivers and harbors bill," carrying large appropriations for this purpose, has been passed; but, unfortunately, much of the money has been frittered away on minor projects which have only a very slight relation to the upbuilding of trade.

THE MERCHANT MARINE.

In order that a country may build up a profitable trade, both with foreign lands and between different parts of its own territory, it needs vessels of its own. Consequently, it has been the policy of the United States to encourage the upbuilding of an American merchant marine. Ever since the Revolution there has been such a fleet, but from time to time it has varied greatly in size. Different methods of encouragement have been used. One of them is the restriction of all trade between American ports to vessels of American registry. No foreign vessel is permitted to carry passengers or freight directly from one American port to another. Sometimes actual subsidies are also given to American companies engaged in foreign trade, usually under color of lucrative payments for the carrying of mail. During the First World War, moreover, a large number of vessels were constructed by the government as a public enterprise; and, for a time after the war, these ships were operated by the United States shipping board; but ultimately most of them were sold to private companies. Again, following the outbreak of the second war the building of merchant vessels was pushed ahead on an even larger scale. This work was the responsibility of the United States maritime commission.

SAFETY AND SUPERVISION.

The federal laws contain many provisions relating to the management of American merchant vessels, particularly in the interest of safety and for the protection of seamen. These rules are enforced by the bureau of marine inspection and navigation in the department of commerce. Aids to navigation are also maintained by the federal government, including lighthouses, buoys, landmarks, lifesaving stations, radio-beam stations, and coast patrols. The national government likewise makes surveys of the coasts and provides charts for the use of navigators. Mention should also be made of the greatest enterprise ever undertaken by any country for the promotion of its own maritime commerce: namely, the building and maintenance of the Panama Canal.

HIGHWAYS AND OTHER FACILITIES FOR INLAND TRADE.

The national government, during the past twenty years, has also been spending large sums of money, in cooperation with the states, for the building of motor highways. This has resulted in the construction of a national highway system over which a large part of the inland commerce in passengers and freight is now being carried by motor vehicles. But the progress of

commerce depends not only on ships and railroads, motor trucks and airplanes, but upon the possession of accurate knowledge concerning markets, prices, and business opportunities. To provide these data, the federal government maintains offices (under the supervision of the department of commerce) in all the principal cities of the United States. Their function is to cooperate with local business organizations, such as chambers of commerce and boards of trade, in the development of home markets for American products.

COMMERCE AFTER THE WAR: THE PESSIMISTIC VIEW.

During a war of world-wide dimensions the flow of international trade declines to a mere trickle. In the past it has always revived with the return of peace. But the extent of its revival in our own generation is something which cannot be accurately forecast. During the decade before the outbreak of the Second World War, disquieting tendencies had revealed themselves. A prolonged economic depression led many countries to impose foreign-trade controls. The main object, no doubt, was to protect their domestic markets against falling prices. But, when trade began to recover, the restrictions were maintained. In fact, governments showed more and more concern over the balance of trade, striving to limit imports and expand exports. With ultimate war in prospect, they turned to a policy of mercantilism rather than laissez-faire, and of economic isolation rather than free exchange. Some of them seemed to be aiming at an economic self-sufficiency which, in extreme cases, impelled them to squeeze gasoline out of shale rock and make shirts out of skimmed milk rather than import oil or cotton from outside their own borders. Where their own products could not be readily sold abroad, they sometimes gave export subsidies; or they organized "cartels" by which their producers continued to control markets and divide the trade equitably among themselves, thus eliminating competition. Finally, they resorted frequently to the "quota" system. Under this arrangement one country would not buy goods from another unless the latter agreed to purchase an equal amount of something else in return.

ITS BASIS.

Will this economic nationalism, or desire to become free from dependence upon other countries, prove to be only a temporary international aberration or will it be something to be reckoned with permanently? Over a long period this neo-mercantilism has been growing more obtrusive. It may be connected in some measure with the renaissance of paternalism, or the inclination of governments to regulate the economic life of their peoples. When a government begins to regulate prices, wages, working conditions, profits, etc., it places itself at a disadvantage in foreign competition with countries which leave such

matters more or less free of regulation. Then, to protect itself, it sets up tariff barriers and, if these do not suffice, the next resort is to export subsidies, cartels, quotas, etc.[1] Are we going to find that regimentation of economic activities inside any country inevitably leads to the exercise of control over that country's imports and exports? And if the practice becomes general, what will be the effect on the free flow of international commerce?

THE OPTIMISTIC VIEW.

There is room, however, for a more optimistic view. Countless millions of people have had opportunity to learn that a closed economy of quotas and subsidies makes for national impoverishment. Will not the futility of such sacrifices become apparent when, after the years of warfare, normal conditions are again possible? Then free international exchange of products may be regarded as a way of escape from low standards of living. The means are at hand: production geared high to meet the wastage of war, markets crying out for collaboration, and a mercantile marine of colossal size that will bid for cargoes all over the seven seas. What will be the result? An eclipse of economic nationalism or a recrudescence of it?

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CHAPTER XXVI

MONEY, BANKING, AND CREDIT

If this country, with its population, its resources, and its chances, is not made prosperous by the intelligence, industry and thrift of its people, does any sane man suppose that politicians have devices at their control for making it so? — *William Graham Sumner.*

Money is the great lubricant of commercial transactions. It facilitates the exchange of goods and services. Likewise, it provides a measure of value and a medium for savings. It performs these functions to the best advantage when its value is kept stabilized; and this cannot be done without some centralized control over the coining or issuing of money. Coinage, therefore, became a governmental function many centuries ago. Kings and other rulers took charge of it — and often made it a source of profit to themselves.

WHAT MONEY DOES.

The American colonies had no uniform coinage, although English currency was supposed to provide the standard of value. Accounts were reckoned in pounds, shillings, and pence. But Spanish, Portuguese, and French coins circulated freely in all the settlements, particularly in the southern ones. This was a handicap to the normal operations of trade because the foreign currencies fluctuated in value. And the situation became much more serious during the Revolution when both the states and the Continental Congress began issuing great quantities of paper money with no gold or silver behind it. Inflation resulted on a large scale.

OUR EARLY EXPERIENCE WITH IT.

One of the primary needs of the postwar period was to establish a sound monetary system. Consequently, the Constitution gave Congress the exclusive power to coin money, thus centralizing the control. Nothing was said about the right of Congress to issue paper notes, although the Constitution expressly withheld that right from the states.[1] These arrangements were the direct outcome of the monetary chaos which the country had endured during the years preceding 1787. The framers of the Constitution

THE CURRENCY POWER OF CONGRESS.

[1] The states, nevertheless, may charter banks and may give these banks the right to issue paper notes; but, since 1863, all such notes have been subject to a federal tax of ten per cent per annum and, hence, none of them is in circulation.

realized, from this experience, that, so long as each state retained the power to coin money and to issue paper notes, the country could never hope to maintain a uniform standard of values or a stabilized medium of exchange. Without this, there could not be a system of free trade among the states.

THE FEDERAL COINAGE IN THE NINETEENTH CENTURY.

The new federal government lost no time in using its power "to coin money and regulate the value thereof." On the recommendation of Alexander Hamilton, the first secretary of the treasury, Congress authorized the establishment of a mint for the coining of silver and gold at a ratio of fifteen to one. It provided for all such coinage upon a decimal system, with eagles, dollars, dimes, and cents. Gold and silver coins continued to be minted on this basis until 1873, when the laws were revised and the coining of silver dollars was suspended. This action aroused much opposition; and, during the next quarter of a century, the free-coinage-of-silver issue became prominent in national politics. There was a widespread conviction that the free coinage of silver would stimulate prosperity in the mining and agricultural regions.

THE CONFLICT OVER BIMETALLISM.

The national election of 1896 was fought on this issue, with William J. Bryan, the Democratic candidate for the presidency, championing the cause of bimetallism. But the Republicans, having been victorious, settled the matter a few years later by the "Gold Standard" Act of 1900, which required the treasury to keep all forms of currency on a parity with gold — the value of gold being set at $16.00 per ounce. In other words, the treasury was bound to redeem any other kind of money, including paper money, by giving 25.8 grains of gold, nine-tenths fine, for each dollar of it. It is not necessary to delve into the economic merits of the controversy over free silver; but the question bulked large in political discussion during the outgoing years of the nineteenth century.[1]

THE ABANDONMENT OF THE GOLD STANDARD IN 1933.

From 1900 to 1933 the United States remained firmly on the gold standard. Silver was coined and circulated, but it did not serve as a standard of value. The United States remained on a gold basis throughout the First World War, when several other countries had to abandon it. In the spring of 1933, however, the crisis in American banking became so acute that all holders of gold coin, gold bullion, and gold certificates

[1] For detailed accounts see Davis R. Dewey, *Financial History of the United States* (revised edition, New York, 1934), J. L. Laughlin, *History of Bimetallism in the United States* (4th edition, New York, 1900), and A. B. Hepburn, *A History of Currency in the United States* (revised edition, New York, 1924).

were ordered to deliver the same to the government in exchange for paper currency.

THE DEVALUATION OF THE DOLLAR.

Having secured control of all the gold coin, gold bullion, and gold certificates, the government announced the abandonment of the gold standard. Paper money could no longer be converted into gold. Debtors were relieved of their traditional obligation to pay "in gold coin of standard weight and fineness." [1] Then, Congress having authorized the President to reduce the gold content of the dollar, the President devalued the dollar in 1934 by about 41 per cent.[2] This action increased the value of gold in terms of paper money and gave the government a large "profit" on the transaction. Part of the gain accruing to the treasury from the devaluation was set aside as a stabilization fund to steady the dollar on its new basis and to support the national credit.

Meanwhile, provision was made that the national government would buy gold from both inside and outside the country, paying for it at the new and higher price, which was above the world market. All in all, the accumulation finally amounted to nearly twenty-five billion dollars' worth of this metal, which is more than half the world's entire stock of monetary gold. What has been done with it? A large part of it is stored away and heavily guarded in vaults at Fort Knox, Kentucky, and elsewhere.

COINAGE OF SILVER RESUMED.

But this was not all. In the spring of 1934 Congress passed a Silver Purchase Act which authorized the secretary of the treasury to purchase silver until the metallic reserve should be composed of gold and silver in the proportion of three to one. Against this purchased silver the treasury was authorized to issue silver certificates to full value. This has resulted in a large and steady accumulation of silver bullion, because the price paid for it has been above the normal market level. The government's stock of monetary silver is now valued at over two billion dollars; much of it is similarly stored in guarded depositaries.

THE LEGAL TENDER ISSUE.

The federal government, as has been said, was given from the outset the exclusive right "to coin money," but the Constitution does not expressly give it authority to issue paper money, nor does it forbid such action. Not until the Civil War did Congress try to avail itself of the privilege thus accorded by the silence of the Constitution, although on two occasions it chartered banks with

[1] This action was upheld as constitutional by the Supreme Court in The Gold Clause Cases, 294 U. S. 240 (1935) and 294 U. S. 330 (1935).

[2] To be exact, the devaluation brought the dollar to 59.06 per cent of its former figure.

the right to issue paper notes. But in the stress of the great civil conflict, the national government authorized its first direct issue of paper currency known as "greenbacks." These were inconvertible notes, that is, they were not redeemable in either gold or silver. In order to ensure them a ready circulation, however, they were declared legal tender for all payments except customs duties and interest on government bonds. For a time, it was a much-debated question whether Congress, in the absence of express constitutional authority, had a right to issue such paper money, but the Supreme Court finally decided, in 1871, that the action came within the implied powers of the national government as a method of borrowing money.[1] It is now well established, therefore, that Congress can authorize the issue of paper money to any extent that it pleases and under such conditions as it may see fit.

EXISTING TYPES OF PAPER MONEY.

Only three kinds of paper money are now widely used in the United States. The first, and most common, are federal reserve notes. These are issued by the federal reserve banks in denominations of $5.00 and upwards. Second are the silver certificates, chiefly in one dollar bills. If you look at the paper money in your pocketbook, you will find that it probably belongs to one or the other of these two classes. But there is a chance that this will not be the case because there is a third type of paper currency in circulation: namely, United States notes issued by the national treasury. This is a greater variety of paper money than can be found in most other countries; but the diversity is not objectionable so long as the different kinds of currency are maintained at a parity with one another. Nobody looks to see whether the bills that he receives at the bank cashier's window are silver certificates, federal reserve notes, or United States notes. It is enough that in making purchases or paying debts one kind of paper currency serves just as well as the others.

FRACTIONAL CURRENCY.

Metal coins, including silver dollars, fractional currency (half dollars, quarters, dimes, nickels, and pennies), are turned out at government mints. There are three of these mints, located at Denver, Philadelphia, and San Francisco. Silver dollars are not so greatly in demand as they used to be, but the need for other silver coins has grown with the nation's business. Since the advent of retail sales taxes the circulation of nickels and pennies has considerably increased. The growth of cash-and-carry trade at retail stores has also stimulated the demand for fractional currency. Paper money is manufactured by the bureau of engraving and printing in Washington. This great establishment likewise prints the vast supply of postage stamps

[1] Knox *v.* Lee, 12 Wallace 457 (1871). See also Juilliard *v.* Greenman, 110 U. S. 421 (1884).

which are needed each year together with savings bonds, war savings stamps, etc. Postage stamps can be used only once; but paper currency, when it gets badly soiled from use, is sent back to the bureau, where it is laundered and again put into circulation. Ultimately, however, the paper gets worn to a point where the bills are returned to the bureau and destroyed.

EARLY NATIONAL BANKS AND BANKING

During the first quarter of the nineteenth century, the Supreme Court was also called upon to settle the question whether Congress could establish a national bank, for the Constitution contains no mention of banks or banking. A proposal to give the national government such power was rejected by the constitutional convention. Accordingly, the right to charter and regulate banks might be looked upon as falling within the residual powers of the states. But Alexander Hamilton, as secretary of the treasury, did not so understand it. On the contrary, he proceeded to work out a plan for the establishment of a great financial institution somewhat after the model of the Bank of England; and, in 1791, Congress chartered the first Bank of the United States, a semipublic institution with 20 per cent of its stock owned by the government. The ostensible purpose in establishing this bank was to assist the national government in the exercise of its borrowing power, the collection of its revenues, and the custody of its funds.

MAY CONGRESS CHARTER BANKS?

THE FIRST BANK OF THE UNITED STATES (1791–1811).

The first Bank of the United States continued in existence until 1811 when its twenty-year charter expired. It established eight branches in different parts of the country, served as a depositary for public funds, and loaned the government considerable sums of money. The bank was well managed and proved profitable, but its charter was not renewed in 1811 because it had in various ways aroused public opposition.[1] A few years later, however, the financial embarrassments caused by the War of 1812–1815 induced Congress to establish a second Bank of the United States, its charter being issued in 1816. This bank was empowered to issue paper money, served as a depositary for public funds, assisted the treasury department in the collection of the public revenues, and at times made temporary loans to the national government. Like the first bank it was a semipublic institution and its charter was fixed to run for twenty years.

ITS HISTORY AND END.

THE SECOND BANK OF THE UNITED STATES.

[1] For the history of this bank see J. T. Holdsworth, *The First Bank of the United States* (Philadelphia, 1910).

Thus far the authority of Congress to charter a bank had aroused controversy among politicians and pamphleteers, but the question had never come squarely before the Supreme Court. Soon after the second Bank of the United States had begun its operations, however, the question of constitutionality was brought forward in a way which enabled the point to be settled definitely.

THE QUESTION OF ITS CONSTITUTIONAL STATUS.

What happened was this: in 1818 the legislature of Maryland imposed a stamp tax on all paper money issued by banks within that state, and the cashier of the federal bank's Baltimore branch, McCulloch, refused to pay this tax. He was convicted by the Maryland courts and appealed to the Supreme Court of the United States, which proceeded to set a constitutional landmark by its decision in the case of McCulloch *v.* Maryland.[1] While the immediate issue was whether the state of Maryland had the right to tax the circulation of a bank which had been chartered by Congress, this controversy raised the constitutional question whether Congress had the right to charter a bank at all.

THE DECISION IN MCCULLOCH *v.* MARYLAND.

The decision in the case, written by Chief Justice Marshall, has become one of the classics of American jurisprudence. It is the longest and most masterful of all Marshall's decisions. With clearness and force the Chief Justice pointed out that the Constitution had expressly given the national government power "to lay and collect taxes" and "to borrow money on the credit of the United States." It had also expressly granted to Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Putting these provisions together, Marshall declared that the Constitution intended Congress to have all reasonable discretion in choosing the means best suited for making its powers effective. Here is the way he phrased it:

CHIEF JUSTICE MARSHALL ON THE IMPLIED POWER TO CHARTER BANKS.

> Throughout this vast Republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?

[1] 4 Wheaton 316 (1819).

Congress having been thus authorized to provide its own financial agencies, it follows that any institution created in this way must not be subjected to the danger of destruction by the states. "If," declared the Court, "the states can tax one instrument, employed by the [national] government in the execution of its powers, they can tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the customhouse; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." And since "the power to tax involves the power to destroy," Marshall argued that this power of the states, if permitted, would make possible the destruction of the national government. Accordingly, the law of Maryland which taxed the circulation of the United States Bank was declared unconstitutional.

A COROLLARY FROM THE GENERAL PRINCIPLE.

The decision in this case attracted nation-wide attention and was of the highest importance, for it set the powers of the federal government upon a firm and sure foundation. Marshall's brilliant biographer declares that it "rewrote the fundamental law of the nation," which is an overstatement; but the decision is nevertheless an outstanding example of Marshall's judicial statesmanship and his mastery of the English tongue.[1] If his fame as a jurist rested on this decision alone, it would still be secure, for the decision in McCulloch *v.* Maryland made the powers of Congress dynamic and, hence, able to keep pace with the progress of the nation.

IMPORTANCE OF THE DECISION.

The second United States Bank came to an end in 1836, but not because of any doubts as to its constitutional status. Becoming enmeshed in politics, it incurred the wrath of Andrew Jackson and his friends. President Jackson vetoed a bill passed by Congress for renewing the bank's charter and withdrew all government deposits from it. Forced to the wall, the institution was converted into a state bank; but, in this form, it did not prove a success and finally went out of existence, thus leaving state banks a clear field throughout the country.[2]

JACKSON'S WAR ON THE BANK.

Although projects for the establishment of another central bank with a federal charter were set afoot from time to time during the next quarter of a century, none of them materialized. The banking operations of the country from 1836 to 1863 were carried on by state banks, chartered in the several states under a variety of banking laws, good, bad, and

[1] Albert J. Beveridge, *Life of John Marshall* (4 vols., Boston, 1916–1919), Vol. IV, p. 308.

[2] The full history of its vicissitudes may be found in R. C. H. Catterall's *Second Bank of the United States* (Chicago, 1903).

indifferent. These banks supplied the country with paper money, but very few of them kept an adequate reserve of silver or gold to redeem their notes if the occasion should arise. So, when the Civil War broke out and there was a run on the banks, they were unable to provide redemption. Even worse, they could not give the national government any appreciable help in floating its war loans. So Congress, in 1863, decided to adopt a plan whereby these state banks might become national banks by purchasing designated amounts of government bonds and pledging these bonds as security for the redemption of their paper notes. The origin of the American national banking system is to be found, therefore, in the financial exigencies of the federal government during the darkest days of the Civil War. It represented, at the outset, an ingenious scheme for marketing government bonds.

BANKS AND BANKING FROM THE JACKSONIAN ERA TO THE CIVIL WAR.

The plan proved successful beyond expectation and the national banks continue to the present day. There are now more than five thousand of them scattered throughout the country and they vary in size from the Chase National Bank of New York,[1] with deposits of over four billion dollars, to little institutions in rural towns, which have only a few hundred thousand. All of them are private institutions, with capital subscribed by stockholders; but they are chartered by the federal government (not by the states) and they carry on their operations under federal supervision. This work of supervision is entrusted to the comptroller of the currency. Their original power to issue paper money (national bank notes) has now been withdrawn.

NATIONAL BANKS, 1863–1913.

Although this system of decentralized national banks rendered good service during decades following the Civil War, it had various shortcomings which bankers and business men recognized. For one thing, the requirements relating to bank reserves were so inflexible that they became embarrassing to the banks in times of commercial depression. Another defect arose from rigid limitations on the issue of paper notes. Each national bank could issue paper money, but only up to the amount of the government bonds owned by it and placed on deposit in Washington as security for the notes. Thus, national bank notes were tied to government bonds and bore no relation to the volume of business done in the country. Some arrangement was needed, therefore, whereby bank notes and bank credit could be automatically increased in times of business expansion and reduced when the volume of business transactions decreased.

THEIR WEAKNESS.

[1] It is named for Salmon P. Chase, who, as secretary of the treasury, planned the national banking system of 1863.

THE FEDERAL RESERVE SYSTEM

To provide this elasticity was the purpose of the Federal Reserve Bank Act which Congress passed in 1913. By the provisions of this statute (considerably amended in later years) the United States is divided into twelve federal reserve districts, with a federal reserve bank in each. The capital stock of each federal reserve bank is owned in varying amounts by the member banks within its district. These member banks include not only all the national banks but many state banks as well. Each reserve bank is controlled by a board of nine directors, three of whom are named by the board of governors of the federal reserve system in Washington, while the other six are chosen by the member banks. One of the three government-named directors is designated as chairman; but the president of the bank, who is its chief executive officer, need not be appointed from this limited category. He is chosen by the nine directors with the approval of the board of governors in Washington.

THE FEDERAL RESERVE BANK SYSTEM ESTABLISHED (1913).

This board of governors of the federal reserve system has general supervision over the twelve federal reserve banks.[1] It is composed of seven members appointed by the President of the United States with the advice and consent of the Senate for fourteen-year terms. Not more than one member may be appointed from any federal reserve district. One member of the board is designated by the President as chairman and another as vice-chairman, each for a four-year term.

ITS GOVERNING BODY.

The federal reserve system was intended to serve as a stabilizing influence upon the entire credit system of the nation. To strengthen it in that direction, Congress in 1935 authorized the establishment of an "open-market committee" consisting of the members of the board of governors and five representatives of the various federal reserve banks. This committee controls the actions of the twelve federal reserve banks in buying and selling, at home and abroad, bonds and other obligations of the United States, as well as bills of exchange and certain other securities. Such open-market operations are intended to serve as a balance wheel on the supply of bank credit available for business operations. They also help to stabilize the value of government bonds. When the reserve banks, for example, buy in the open market a billion dollars worth of government obligations, this strengthens the market for government bonds, thus keeping up the price

THE "OPEN-MARKET COMMITTEE."

[1] They are located in New York, Boston, Philadelphia, Cleveland, Chicago, St. Louis, Richmond, Atlanta, Dallas, Minneapolis, Kansas City, and San Francisco.

of the latter. No federal reserve bank may engage or decline to engage in open-market operations, except in accordance with the directions of the open-market committee.

"BANKERS' BANKS."

The twelve federal reserve banks are "bankers' banks"; they do not carry on a general banking business with individuals and corporations. They have three chief functions: (1) to serve as depositaries for surplus government funds and for the excess reserves of member banks; (2) to act as fiscal agents of the national government in the collection of its revenues, the transfer of public funds, the payment of government checks, and the sale of government bonds; and (3) to provide rediscounting facilities for the use of all the member banks. This term "rediscounting" should have a word of explanation because it involves the issue of federal reserve notes, the largest class of paper money now in circulation.

THE PROCESS OF DISCOUNTING.

Rediscounting, of course, is preceded by discounting. When a national bank or state bank lends money and takes a man's note, with or without collateral security, it is said to "discount" the note. It gives the borrower the face value of his note less the interest calculated at the current rate. Thus, if the rate is five per cent and the person gives his note for one thousand dollars payable in six months, the bank would hand him $975 in money. Merchants, for example, borrow money in this way to buy goods and then pay off their notes when the goods are sold. Such notes are called "commercial paper."

REDISCOUNTING.

Now, suppose a local bank has loaned all the money it can spare. When it receives applications from its customers for more loans, what does it do? It takes a bundle of business men's notes, or other eligible collateral, from its vaults and sends them to the nearest federal reserve bank. The latter does just what the local bank did in the first instance; it deducts the discount and gives the balance to the member bank in money. The member banks are enabled in this way to loan a great deal more money than would otherwise be the case. It is a revolving process. Each loan that a bank makes on eligible paper is a basis for acquiring money with which to make more loans.[1]

But how do the federal reserve banks obtain the money to do this? They are allowed to issue federal reserve notes on the security of rediscounted commercial paper and certain other collateral, provided they

[1] The terms "discounting" and "rediscounting" should not be too strictly construed. Sometimes the bank gives the borrower the full amount of his note and collects the interest when the note matures. Such notes are similarly eligible for rediscounting. The rules as to eligibility have been extended to include not only commercial paper but notes secured by mortgages. Wide latitude with respect to the rules has also been vested by the Banking Act of 1935 in the board of governors of the federal reserve system.

keep a reserve in gold certificates (i.e., certificates backed by the federal government's stock of gold) amounting to at least 40 per cent of the total notes issued by them. They are also required to keep a reserve in gold certificates or lawful money amounting to not less than 35 per cent of their deposits. The governors of the federal reserve board in Washington may permit a change in the foregoing percentages, and would do so if the need for more commercial credit demanded it. In any event, this credit, and the paper money available to provide it, are now closely synchronized with the expansion or contraction of business.

NOTE ISSUING BY FEDERAL RESERVE BANKS.

During the twenty years which followed their establishment in 1913, the work of the federal reserve banks proved to be of great value. Banking operations were enabled to expand during the years of the First World War and to contract when the war was over. But, in the great business upsurge which took place during the years 1925–1929, the system did not provide an adequate brake on the over-expansion of credit, much of which was used for speculation. Then, in the autumn of 1929 when the speculative boom began to flatten, many depositors became alarmed and began to withdraw their deposits for hoarding in safe-deposit boxes. To forestall a general collapse, the states resorted to the device of proclaiming bank holidays. By March 4, 1933, all the states had closed their banks by such proclamations. This was the day on which President Franklin Roosevelt took his first inauguration oath. On the following day, he transformed these state holidays, by proclamation, into a national bank holiday which was to continue until further notice. Every banking institution in the United States was closed. The American banking system had collapsed.

MERITS AND SHORTCOMINGS OF THE FEDERAL RESERVE SYSTEM.

At once, a special session of Congress was called and enacted the Emergency Banking Act of March 9, 1933. Among other things, this act liberalized the provisions relating to the issue of federal reserve bank notes by permitting the reserve banks to make advances not only on commercial paper and government bonds but on any acceptable assets of a member bank, including mortgages. Within a short time the national bank holiday was concluded and the reopening of the banks began. To provide more capital for those banks which needed it, an arrangement was made whereby the government, through its reconstruction finance corporation, advanced the funds and took preferred stock in return.

THE EMERGENCY BANKING ACT.

The crisis of 1933 shocked the confidence of the public in the banking system of the country. It was feared that many people would be reluctant

to deposit their savings in any bank unless the federal government would guarantee to get them their money back when they wanted it. Consequently, the federal deposit insurance corporation was created by Congress to provide such guarantee. When banks take this insurance (and nearly all of them have done so) it protects each depositor in full up to a maximum of $5,000. The plan is financed by levying an annual assessment on all banks which participate in it. The amount of this assessment is one twelfth of one per cent on the insured deposits of each bank.

THE INSURANCE OF DEPOSITS.

From what has been said in the foregoing paragraphs, one should not carry away the idea that the control of banking and credit in the United States is exclusively a function of the national government. There are still about twice as many state banks as there are national banks; but, unless a state bank is a member of the federal reserve system or of the federal deposit insurance corporation, it is not subject to any national regulations at all. It remains responsible to the state banking authorities and to state laws, which display all degrees of strictness and laxity. This lack of fully centralized control is unfortunate, for credit is a service which recognizes no geographical or political boundaries. But it would not be easy to change this situation because the states are jealous of their prerogatives and would be averse to giving up whatever banking powers they still retain.

STATE BANKING INSTITUTIONS.

FARM CREDIT AND OTHER BANKING AGENCIES

The national banking system and the federal reserve banks were developed, in the main, to meet the requirements of industry and commerce. They did not cater to the special needs of agriculture and stock-raising. Yet these needs increased during the opening decades of the twentieth century; for, as agriculture becomes more specialized, its operations require more capital. The grain farmer of the West, the cotton planter, the rancher, the fruit grower, the dairy farmer — all require credit facilities beyond those which were needed by the diversified farming system of earlier days. They need money to purchase equipment, pay wages, and carry them through from one crop sale to another. Diversified farming brings in cash returns every little while; but specialized agriculture sometimes does not bring in more than one or two cash payments per annum — when the wheat or cotton crop is sold, or the cattle marketed, or the fruit sent to the canneries.

THE FEDERAL LAND BANKS.

To furnish these farmers and ranchers with banking facilities as good as those which had been provided for the merchant and manufacturer,

Congress in 1916 passed the Farm Loan Act establishing a system of federal land banks. The entire country was divided into twelve districts, in each of which a federal land bank was established, with various officers and directors who are now appointed by the farm credit administration at Washington. This farm credit administration supervises the whole agricultural credit system, which includes not only the federal land banks and joint-stock land banks but the intermediate credit banks, the production-credit associations, the banks for cooperatives, the federal farm mortgage corporation, the federal credit unions, and the production credit corporations.

HOW ORGANIZED AND CONTROLLED.

This is hardly the place to explain in detail the organization and functions of these various farm credit agencies. It is enough to say that, taken together, they provide the agriculturist with credit facilities which are, if anything, better than those at the disposal of the merchant, manufacturer, or shipper. They make it possible for the farmer to obtain, at reasonable rates of interest and on lenient terms of repayment, long-term loans on his land, short-term loans on his crops or stock, in fact loans for all types of farm and ranch operations. In addition, the national government has provided a system of crop insurance and an organization for the marketing of surplus farm commodities, as will be explained in a later chapter.

A word should also be said concerning the home owners' loan corporation established during the economic depression of the thirties to assist the owners of heavily mortgaged homes, particularly in towns and cities, by giving government-guaranteed bonds to the mortgage holders in exchange for these mortgages and then dealing leniently with the debtors. The corporation eventually ceased its active lending operations and, as part of another federal agency, is now engaged in administering the mortgage obligations which it acquired but which are not yet paid off.[1]

HOME OWNERS' LOAN CORPORATION.

RECONSTRUCTION FINANCING

The economic depression which began in 1930 brought large numbers of business corporations to the verge of bankruptcy. Many of them, although possessing substantial assets, were unable to borrow money with which to carry on their operations. The same was true of cities and other municipal corporations in some instances. Under normal conditions the regular commercial banks could have given the necessary

[1] In 1939, H O L C was consolidated with other bodies to form the federal loan agency and later, in 1942, transferred to the national housing agency. By December, 1942, almost half of the three and a half billion dollars loaned by H O L C had been repaid.

financial relief, but these banks were already glutted with "frozen loans," that is, loans which were good enough but could not be quickly collected. As early as 1932, therefore, a reconstruction finance corporation (R F C) was created for the purpose of lending funds to railroads, industrial concerns, banks, and even municipalities, to save them from financial collapse. In due course, the lending operations of the R F C were widened to include various forms of small private business as well as agriculture and stock-raising in cases where ordinary bank credit was not available.

ACTIVITIES OF THE R F C.

The management of the reconstruction finance corporation is vested in a board of five directors appointed by the President with senatorial confirmation.[1] It functions through a central office in Washington, but has loan agencies in some thirty cities all over the country. The funds used by the corporation have been supplied in part by the federal government directly, but in larger part by the sale of the corporation's own obligations, which carry the government's guarantee. Many billions of dollars have been raised and loaned in this way. During the war emergency, moreover, the R F C was utilized as an agency for organizing and financing various subsidiaries vital to the national defense. These included corporations for the purchase and holding of rubber and metals, the expansion of munition plants, the building of homes for defense workers, etc. In addition, it has provided funds for the Export-Import Bank of Washington, which was established to facilitate trade with foreign countries, and it has also supplied capital to numerous federal loan and savings associations throughout the country. In all cases, the reconstruction finance corporation is supposed to make the loans on "full and adequate security"; and, although this provision has been interpreted somewhat leniently, many of the earlier loans have been repaid in full.

THE SYSTEM OF HOUSING CREDIT.

A concluding word should also be said with reference to credit facilities provided through the regular banks by the federal housing administration. The latter does not lend money, but partially insures lending institutions against losses which they may incur by making approved loans for the modernizing, repairing, or equipping of buildings. The insurance in such cases runs up to a designated per cent of the aggregate amount of such loans made by any lending institution. Long-term mortgage loans may be insured up to a large fraction of the appraised value of improved housing property.[2]

[1] In 1942 the R F C was transferred to the department of commerce and early in 1945 retransferred to the federal loan agency.

[2] The federal housing administration was established in 1934. At that time the construction of homes had all but ceased because of the depression. The new agency, through its program

THE POSTAL SAVINGS SYSTEM.

In any discussion of banks and savings institutions some mention should be made of the postal savings system. Under authority of Congress the postmaster general is allowed to designate post offices as savings depositaries. Such offices may receive deposits up to $2,500 from any individual and pay interest thereon. The deposits are invested in government bonds. Proposals have been put forward to authorize the loaning of postal savings to private borrowers, but Congress has not favored this line of activity.

A HIGHLY COMPLEX SYSTEM OF CREDIT AND BANKING.

From all this, it will be observed that the banking and credit system of the United States is exceedingly complicated. It is more complex than that of any other country. Very few students of American government try to understand it because they assume that banking and credit are matters of economics, not of political science. In a sense that is true, but the control of currency, banking, and credit (and through them the control of prices) is one of the most important functions that any government is called upon to perform. In the United States it has become primarily a function of the federal authorities, although the states still retain the right to charter and supervise state banks, trust companies, savings banks, cooperative banks, and similar agencies of credit. Other countries have only one, or, at most, two or three types of banking and credit institutions; in the United States there are at least a dozen varieties of them, with functions and limitations which defy concise description. One of the country's urgent needs would seem to be a simplified and integrated system of business credit.

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of insurance, brought the purchase of homes within the reach of families in the low-income groups. Within a period of ten years almost $4,500,000,000 was made available for housing, and at least one tenth of the whole American population now lives in houses built, purchased, or improved through the activities of the F H A.

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CHAPTER XXVII

INDUSTRY, LABOR, AND SOCIAL SECURITY

All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. — *John Stuart Mill.*

COMMERCE AND INDUSTRY DISTINGUISHED.

It is difficult to draw a sharp dividing line between commerce and industry. Generally speaking, industry produces manufactured goods and services, while commerce distributes them. One is an instrumentality of production, the other, a part of the mechanism of exchange. The two are nevertheless interdependent, for industry on a large scale cannot exist without commerce to market its products, while commerce without industry would be even worse off. In the United States handicraft industries have expanded into huge manufacturing plants where assembly-line and other mass-production techniques have gained widespread adoption. The products of these enterprises not only enter domestic commerce but they percolate into commerce on an international scale. Hand in hand with mass production has come the rise of great industrial corporations, each owned by thousands of stockholders but necessarily managed by small groups, whose responsibility to these stockholders is neither direct nor definite.

THE RISE OF TRUSTS AND COMBINATIONS.

During the nineteenth century it was generally assumed that competition among producers would serve as an automatic safeguard against monopoly and would protect the public against artificially high prices. This assumption proved to be generally sound as long as productive enterprise was dispersed into many small units and managerial authority was not concentrated in a few hands. But when large-scale enterprise came upon the scene, the protection afforded the consumer began to diminish, because competition itself began to disappear. Often the large industrial corporations, instead of engaging in vigorous competition, formed combinations among themselves, thereby enabling them to monopolize the market and consequently to increase their own profits, to the detriment of their customers. These combinations were commonly called trusts, because one of the

earlier ways of creating them was by vesting the stock of several companies in the hands of a few trustees. The trustees, in possession of the stock, had power to elect the directors of the several companies and to dictate a common policy for all of them. Other types of combinations, sometimes indiscriminately called trusts, came into being later. These include the holding company, an example of which was given on a previous page, the private industrial or trade agreement sometimes called the cartel, and certain trade or industrial associations.

THE CONTROL OF INDUSTRIAL CORPORATIONS

Although the evils resulting from these combinations were widely recognized, the task of regulating them was originally left to the states. In somewhat desultory fashion the state authorities tried to apply the old principle of the common law under which all combinations *unreasonably* restraining trade were deemed to be illegal. But this fitful work of the states became steadily less satisfactory as industries broadened their scope. Spreading over several states they were able to escape effective regulation by any of them. In due course, therefore, some large industrial combinations were able to crush out their weaker competitors, raise prices, and establish a virtual monopoly in their own lines of business.

INEFFECTIVENESS OF STATE CONTROL OF COMBINATIONS.

This situation impelled Congress (acting under what was then regarded as a somewhat new interpretation of its constitutional power to regulate interstate and foreign commerce) to pass the Sherman Anti-Trust Act of 1890. The first provision of this statute was as follows:

THE SHERMAN ANTI-TRUST ACT.

> Every contract, or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.

This paragraph, it will be noted, made no distinction between combinations which were unreasonable and those which were not. Going further than the common law, it prohibited all combinations in restraint of trade, whatever their nature or merits. Not only that, but it provided for the criminal prosecution of any one violating the act, and even for the confiscation of such property as was concerned in the unlawful conspiracy. The Sherman law had plenty of teeth in it.

But no law, however drastic its provisions, is worth much unless machinery is established for enforcing it. And none was provided in this case. Congress merely assumed that the attorney general and the department of justice would attend to the enforcement of this law along with other federal laws. But the

ITS EARLY HISTORY.

attorney general and his department had other things to do. It is true that, in 1895, one significant attempt to enforce the Sherman law was made in the case of certain sugar refineries in Pennsylvania which had entered into a combination. But when this prosecution reached the Supreme Court, that tribunal held that the formal combination had taken place within the state of Pennsylvania, that the combined refineries were engaged in manufacturing within a state, and hence that the Sherman Act could not be applied to them.[1] Following this ineffectual attempt at enforcement, the law was virtually permitted to sleep on the statute book.

REVIVAL OF ANTI-TRUST PROSECUTIONS.

But it was promptly aroused from its slumbers when Theodore Roosevelt succeeded to the presidency in 1901. Having stirred the country with his slogan of "busting the trusts," this energetic chief magistrate set out to give the Sherman Act full vigor. As a first step, he persuaded Congress to create a bureau of corporations with the function of investigating violations of the law. Armed with facts which this new bureau provided, he thereupon instructed the attorney general to begin prosecutions of some of the more notorious combinations and these cases were carried to a successful conclusion. In 1904, for example, the Supreme Court rendered a notable decision on the Northern Securities Company, which had gained control of the Great Northern and the Northern Pacific Railroad Companies.[2] This was followed a few years later by similar rulings in the Standard Oil Company's case and the American Tobacco Company's case.[3] All these decisions held that the concerns in question were combinations in restraint of trade and ordered their dissolution.

THE "RULE OF REASON."

In rendering its decision in one of the later cases, however, the Supreme Court explained that the mere existence of an industrial combination did not render it illegal, but that every such combination should be judged in accordance with its real purpose. So, while the Court held these particular combinations to be illegal, it served notice that in the future no trust would be ordered to dissolve for the mere reason that it happened to restrain trade, but only when it appeared to have for its purpose an *unreasonable* restraint of trade. In other words, the Supreme Court read into the opening provision of the Sherman law something which Congress had left out, and its dictum passed into popular discussion as the "rule of reason."

[1] United States *v.* E. C. Knight Co., 156 U. S. 1 (1895).
[2] Northern Securities Co. *v.* United States, 193 U. S. 197.
[3] 221 U. S. 1 (1911) and 221 U. S. 106 (1911).

As a matter of fact, not every combination of industries is harmful. There are "good trusts and bad trusts" as Theodore Roosevelt himself once said. Beyond a certain point industrial competition is not an unmixed blessing. Sometimes it involves the cutting of prices below the profit point and entails a reduction in wages. Free and unrestrained competition has often turned out to be a form of economic wastefulness from which the public gains nothing in the end. Moreover, it has been proved in some instances that a combination among industries enables them to avoid duplication of effort, save administrative expense, and thus reduce prices to the consumer. When the national government in 1917 took over the operation of the railroads, for example, it at once proceeded to do on a huge scale what it had always prevented the railroads themselves from doing. It put everything under central control, eliminated duplication in service, abolished competition in rates, and operated every mile of trackage as part of one giant transportation monopoly. Great savings in the operation of railroads were made in this way, thus demonstrating that there are times when more can be accomplished by the elimination of competition than by the compulsory fomenting of it.[1] Administrative supervision such as is exercised today by the interstate commerce commission and the federal communications commission has a flexibility which makes it more advantageous to the public than the sweeping provisions of an anti-trust law can ever hope to be.

MERITS AND DEFECTS OF THE ANTI-TRUST LAW.

The more discriminating attitude towards combinations expressed in the "rule of reason" led logically to the demand that the antitrust legislation be clarified. Congress responded to this demand in 1914 by enacting the Clayton Act and the Federal Trade Commission Act which, although they did not repeal the Sherman law, placed the whole matter of industrial regulation on a simpler and saner basis. This legislation recognized that there were many business abuses, other than those resulting from formal combination or monopoly, which ought to be eradicated; and it specifically outlined various forms of unethical and unfair activity which are too often prevalent in certain quarters of the business world. Subsequent legislation, notably the Robinson-Patman Act of 1936,[2] which aimed to prevent unfair price discriminations, the Wheeler-Lea Act of 1938, which prohibited deceptive advertising, and the Wool

THE CLAYTON AND FEDERAL TRADE COMMISSION ACTS.

[1] These economies were offset, however, by an expansion in the number of employees as well as by the increased wages and other special expenditures required by wartime emergency. Hence the government's operation of the railroads resulted in a heavy deficit.

[2] Wright Patman, *The Robinson-Patman Act* (New York, 1938), and Benjamin Werne (editor) *Business and the Robinson-Patman Law* (New York, 1938).

Products Labeling Act of 1941, has added to this list of prohibited practices.

Probably the most important single feature of all this legislation was the establishment of a body known as the federal trade commission.[1]

THE FEDERAL TRADE COMMISSION: ITS FUNCTIONS.

This administrative agency, created in 1914, took over the work formerly done by the bureau of corporations and assumed many new duties as well. The functions of the federal trade commission are twofold, legal and economic. In the first place, it is charged with the duty of enforcing the laws against unfair competitive practices on the part of all but a few types of enterprise (such as railroads and banks) which are otherwise regulated.[2] These practices include agreements or combinations to divert trade from competitors, or to control prices, or to deny access to raw materials or to the products of competitors, to maintain boycotts, to grant special discounts and rebates, to require merchants to buy entirely from some one dealer (tying contracts), and a host of other practices deemed to constitute an unfair and unreasonable restraint of trade. The enforcement of the legal prohibition against deceptive advertising also falls within the jurisdiction of the commission. Such deceptive practices cover misrepresentation as to the quality or properties of merchandise; they specifically include false advertising of foods, drugs, and cosmetics, and the failure of manufacturers of woolen goods to reveal the presence of inferior or substitute materials in the finished product. Likewise, the commission is called upon to enforce existing provisions of law prohibiting interlocking directorates among large corporations or the acquisition of stock in competing concerns. A law known as the Webb-Pomerene Export Trade Act of 1918 exempts concerns which are engaged wholly in foreign trade from certain of the provisions of the anti-trust laws, and the federal trade commission is charged with the administration of this act also. Finally, it may be called upon by the federal courts to provide the outline of an appropriate decree in anti-trust suits brought by the department of justice.

THE COMMISSION'S PROCEDURE.

Anyone may invoke the aid of the commission by filing with it a protest stating the facts. Thereupon a preliminary investigation is made. If the commission finds that the protest is justified it cites the offending individual or corporation to appear and explain. Then, if the explanation is not satisfactory, it issues an order

[1] For the organization of this body see pp. 236 and 237.

[2] Railroads, by the interstate commerce commission; banks, by the comptroller of the currency and the federal reserve board; radio broadcasting, by the federal communications commission, etc.

to "cease and desist," in other words, to discontinue the practice which was the basis of the complaint. Such an order goes into effect within sixty days unless an appeal to the courts is taken by the parties against whom it is directed. The courts may annul the order, but if they do not the commission can require its observance with the alternative of prosecution by the department of justice. Occasionally, as in cases involving charges of false advertising, the commission is authorized to seek a writ of injunction in a federal district court requiring the concern to "cease and desist," pending final disposition of its appeal.

FURTHER ACTIVITIES OF THE COMMISSION.

The economic powers of the commission include the right to investigate the business methods and practices of industrial and mercantile concerns engaged in foreign or interstate commerce. To this end it has power to require that such concerns submit special or annual reports giving detailed information as to their activities. It can also summon anyone before it and compel the production of business records. On the basis of its investigations the commission makes recommendations to Congress from time to time, and these have sometimes led to the enactment of additional regulatory laws. Likewise, the federal trade commission has worked out lists of unethical methods practiced in different forms of business, such as deceitful imitation of trademarks and labels, or the ambiguous branding of merchandise, and in many instances has been able to secure the elimination of these practices through the voluntary cooperation of the business men concerned. By its active efforts the commission has notably improved the general standards of American business during the past thirty years. It should be repeated, however, that the work of this body relates only to interstate business; it has no jurisdiction over industries which confine their operations within the boundaries of a single state.

ANTI-TRUST ACTIVITIES OF THE DEPARTMENT OF JUSTICE.

The activities of the federal trade commission are, in a sense, supplementary to the anti-trust activities of the department of justice, which is still responsible for prosecutions under the Sherman Act and subsequent anti-trust laws. A special unit of that department, known as the anti-trust division, has in recent years shown considerable activity in instituting anti-trust suits in the federal courts. During the past half-dozen years, several hundred such suits have been brought against various oil companies, motion-picture producers, automobile manufacturers, electrical-appliance concerns, food processors, etc. Even professional associations in the field of medicine and of music have felt its hand. A surprising number of these suits, moreover, have terminated with decrees in favor of the government.

Although dissolution of business organizations considered monopolistic is occasionally the object of the anti-trust suits, governmental policy in the United States is not nowadays directed primarily at bigness per se, or designed to prevent the concentration of capital, which is apparently inevitable in any great economic community. Rather, the aim is to use various instrumentalities, including the federal trade commission and the anti-trust division of the department of justice, in policing the activities of business, in restraining it from taking undue advantage of competitors and the public, and in trying to make sure that vested interests, in their zeal to protect their own position, do not strangle economic initiative or prevent improvements in the production and distribution of goods and services.

DEPRESSION MEASURES AND WARTIME CONTROL OF BUSINESS

THE DEPRESSION CREATES A NEW REGULATORY PROBLEM.

With the beginning of the depression in 1930, American business experienced a debacle which, for a time, seemed to threaten its very existence. Production of goods and services dropped off alarmingly; prices fell in a nose dive; workers were discharged right and left; those who remained at work had their wages reduced; many industrial plants were shut down altogether and others operated on a part-time basis; while price-cutting competition was virtually forced on nearly every line of business in an effort to keep going at all. Here was a problem that seemed to call for governmental intervention from a new angle. Traditionally, the public authorities had made it their endeavor to promote industrial competition. For a generation they had been trying to curb practices in restraint of trade. Now it appeared that competitive rivalry was being carried too far. Left unchecked, there would be a general lowering of wages and a reduced standard of living in the country as a whole.

THE NATIONAL INDUSTRIAL RECOVERY ACT AND CODES OF FAIR COMPETITION.

In an effort to halt the downward march of prices and wages due to this emergency competition, Congress in 1933 passed the National Industrial Recovery Act. Its principal aims were to secure the maintenance of minimum wages, shorten the hours of weekly work to spread available employment, promote the practice of collective bargaining by workers, eliminate child labor, prevent unfair practices in business, increase the purchasing power of consumers, encourage better planning in business to prevent over-production, and assure to producers a fair price for their goods and services. To achieve these

aims, each branch or major segment of the nation's business and industry was authorized to formulate for itself a "code" incorporating the fundamental purposes of the recovery legislation. Thus, the meat packers, the furniture manufacturers, the garment makers, etc., would each draw up their own code. Such codes, after approval by the President, were to have the force of law. When their provisions conflicted with the existing antitrust laws, the latter were to be virtually suspended; and, for perhaps the first time in the nation's history, economic enterprises were publicly encouraged and even directed to work in unison rather than in rivalry. Provision was made that public hearings, at which all interests might be represented, should precede the formulation of each code. The whole procedure was placed under the immediate jurisdiction of a federal agency called the national recovery administration (N R A).

THE "BLANKET CODE."

It soon became apparent, however, that the task of drawing up some hundreds of codes was a slow and difficult one, and that while the remedy was being prepared, the patient's condition might grow a good deal worse. Accordingly, it was decided that the President should call upon all employers to sign a general "blanket code," which would serve until the special codes had been drafted and approved. More than two million employers accepted this blanket code and received a "blue eagle" insignia to display in their establishments as a symbol of their compliance. For the most part, these employers tried to live up to the labor standards, price commitments, and work-spreading features of the blanket code, but there were many who managed to find ways of evasion.

THE FATE OF THE RECOVERY ACT.

President Franklin D. Roosevelt described the National Recovery Act as the "most important and far-reaching ever enacted by the American Congress." Certainly it was one of the most novel and most ambitious pieces of peacetime legislation ever enacted by any legislative body, and it provided some lessons in economics and public administration which will not be quickly forgotten. But it soon proved to be an ill-conceived piece of legislation. No sooner had the blanket code been put into operation than rumblings of discontent began to be heard on a nation-wide scale. Industry complained that it increased the costs of production, that increased costs meant higher prices to the consumer which, in turn, meant a falling off in the demand for goods. This situation merely aggravated the deflation and aroused public criticism of the N R A from all quarters of the land. The failure of the whole plan was becoming generally recognized in 1935, when the Supreme Court gave the National Industrial Recovery Act its coup de grace by declaring it unconstitutional on two grounds:

first, because its code-making features involved a delegation of legislative powers to the President, and second, because it attempted to regulate business within the individual states and, by so doing, went beyond the commerce-regulating powers of Congress.

SUBSEQUENT LEGISLATIVE INFLUENCE OF THE RECOVERY ACT.

As we shall see presently, however, the labor provisions of the National Industrial Recovery Act were given a new lease of life in the Wagner-Connery Labor Relations Law passed in 1935.[1] Congress also attempted in the same year to embody some of the act's regulatory features in a legislative code for the bituminous coal industry by passing the Guffey Coal Act. Although this was invalidated by the Supreme Court, another measure of similar purport, enacted in 1937, safely passed the judicial hurdle [2] and remained in operation until 1943, when it expired because Congress had failed to renew it.

WARTIME PROBLEMS AND EMERGENCY GOVERNMENTAL CONTROLS.

By 1937 the great economic depression had passed through its more acute phases and a slow recovery had set in. The outbreak of war in Europe and America's subsequent entry into it brought on a wave of prosperity which raised industrial employment, production, and the national income to new high levels. Enthusiasm for the legislative regulation of business and industry, which the economic depression had engendered, waned proportionately. The war, however, created new relations between government and private enterprise. Industry was suddenly required to convert its plant and facilities into the production of goods demanded by a wartime economy. Through various government boards, nearly all the essential raw materials of industry were rationed or subjected to a system of priorities; prices for both these raw materials and the finished products were fixed by a new agency known as the office of price administration (O P A); while the distribution of these products was likewise brought under control, most of them being diverted to the use of the armed forces. Thus, the federal government became industry's largest customer and practically guaranteed its market. To stimulate conversion and insure adequate production, particularly in certain lines of military necessities, the government itself poured funds into the capital structures of many enterprises, leased publicly owned equipment, and even whole plants, to private operators and, through public corporations, directly operated other plants.

This vast industrial mobilization for war has created many problems in the shift from war to peace. Reconversion of industry to a civilian

[1] See p. 449.

[2] Sunshine Anthracite Coal Co. *v.* Adkins, 310 U. S. 381 (1940).

economy has raised not only the problem of disentangling public and private investment in production machinery but the problem of disposing of the huge surpluses of goods, valued at many billions, which the government had accumulated. Other problems have concerned the cancellation of contracts for supplies and services, which the government had made with various enterprises; the order of priority to be observed in releasing various industries from their commitments to manufacture war goods; and the relaxation of price and rationing controls. Further questions have arisen over the future of industries which have been greatly enlarged to meet a wartime need but for whose goods or services there is relatively little demand in normal times. It is possible that when the period of reconversion is over, some relics of the government's wartime control will remain, and it may be that with the war ended the problems which industry faces will call for new forms of governmental intervention. One can hardly expect that the economy of a great nation which has been mobilized for total war can easily revert to the status quo as soon as peace comes. On the other hand, it is already apparent that something approaching the system of free, private enterprise, as it existed in the United States before the war, is being gradually restored.

THE PROBLEM OF RECONVERSION AND THE FUTURE OF ENTERPRISE.

THE NATIONAL GOVERNMENT AND LABOR

Legislative regulation of labor by the national government came later than federal attempts to regulate business. Among the earlier labor measures passed by Congress in the present century were two designed to abolish the employment of children in mines and factories. The first of these, passed in 1916 ostensibly under the national commerce power, sought to close the channels of interstate transportation to goods produced in establishments employing such labor, but it was declared unconstitutional by the Supreme Court.[1] A subsequent statute, enacted in the guise of a revenue measure, attempted to force the abolition of child labor by levying a prohibitive tax on the products of mines and factories employing such labor, but this also was held unconstitutional.[2] In 1918 Congress enacted a minimum-wage law for women and minors, applicable only to the District of Columbia; but here again judicial disapproval interposed.[3] It was not until almost twenty years later that Congress found ways of placing a ban on child labor without going beyond the scope of its constitutional powers.[4]

EARLY LABOR MEASURES; UNSUCCESSFUL ATTEMPTS TO PROTECT WOMEN AND MINORS.

[1] Hammer *v.* Dagenhart, 247 U. S. 251 (1918).
[2] Bailey *v.* Drexel Furniture Co., 259 U. S. 20 (1922).
[3] Adkins *v.* Children's Hospital, 261 U. S. 525 (1923).
[4] See p. 450.

Greater success attended early federal attempts to protect the interests of workers in defined categories of employment. Notable among such efforts was the legislation of 1908, extending workmen's compensation to interstate railway employees, and the Adamson Act of 1916, which granted these same employees the eight-hour working day. Equally noteworthy were the LaFollette Seamen's Act of 1915, which regulated the pay and working conditions of American merchant seamen, and the Merchant Marine Act of 1920, which granted seamen workmen's compensation. A section of the Clayton Act (1914) exempted organized labor from the operations of the Sherman Act and other anti-trust laws, thus, in effect, repealing a decision of the United States Supreme Court in 1908 in which the anti-trust laws had been held to cover labor organizations.[1] The Clayton Act also restricted the issue of injunctions by federal courts in labor disputes. Then, in 1932, the Norris-LaGuardia Act forbade the federal courts to issue injunctions against workers engaged in a strike. Likewise, this act outlawed the "yellow-dog" contracts, that is, contracts in which workers bind themselves not to join a union, by providing that such contracts should be unenforceable in federal courts.

OTHER EARLIER MEASURES TO PROTECT LABOR.

Mention should also be made of certain activities of the department of labor, particularly the collection and publication of labor statistics, the protection of women and children in industry, and the settlement of labor disputes by conciliation. A special agency, outside the jurisdiction of the labor department, was established in 1926 to mediate labor disputes on interstate railways. Known as the national mediation board, its functions now embrace disputes in air transport as well. In general, the principal duty of this board is to mediate differences between the railroads and the air lines on the one hand and their employees on the other, growing out of their attempts to make and maintain agreements establishing the rates of pay, rules, and working conditions, as directed by the Railway Labor Act. Likewise, the board is charged with the function of determining what organization is the duly designated and authorized representative of the employees for collective bargaining.

LABOR DEPARTMENT ACTIVITIES.

ADJUSTMENT OF DISPUTES IN RAIL AND AIR TRANSPORTATION.

All this earlier legislation was of a piecemeal nature, but it paved the way and prepared the public mind for the large-scale federal intervention which began with the inauguration of President Franklin D. Roosevelt in 1933. The vicissitudes of the industrial workers during the depression and

THE DEPRESSION AND SECTION 7a OF THE RECOVERY ACT.

[1] Loewe *v.* Lawlor (Danbury Hatters' case), 208 U. S. 274.

the desire of the labor unions to protect their members against mass unemployment led to a demand for legislation establishing the right of collective bargaining in all industries doing an interstate business. The initial result was the insertion of a provision in the National Industrial Recovery Act of 1933, which read as follows:

> Every code of fair competition . . . shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other connected activities for the purpose of collective bargaining or other mutual aid or protection: (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing: and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.[1]

THE DEBATE OVER THE MEANING OF SECTION 7a.

While this provision might seem to be clear in its intent, it left unanswered the practical question as to how the "representatives of their own choosing" should be selected by the employees. In most industries there is a division of allegiance and opinion among the employees.[2] Some may belong to a regular labor union, some may be members of a company union (that is, a local organization restricted to the service of a single employer), and some may be affiliated with no labor organization at all. Should the majority rule in the selection of representatives for collective bargaining, or should each group do its own choosing? Much controversy was being centered upon the answer to that question, when the Supreme Court declared the National Industrial Recovery Act unconstitutional on other grounds.

THE WAGNER-CONNERY ACT AND THE LABOR RELATIONS BOARD.

In order to secure the retention of these labor provisions in constitutional form, Congress then passed the Wagner-Connery Labor Relations Act (1935) which reaffirmed the principle of collective bargaining and forbade interference with workers by employers, but restricted its provisions to those industries which are engaged in foreign or interstate commerce. The requirements of this law are enforced by the national labor relations board of three members appointed by the President.

[1] National Industrial Recovery Act of 1933, section 7a. See also W. H. Spencer, *Collective Bargaining under Section 7a of the National Industrial Recovery Act* (Chicago, 1935).

[2] On the general question, see J. E. Johnsen, compiler, *Collective Bargaining* (New York, 1935).

The activities of this board have engendered a great deal of controversy. Employers of labor have been critical because they have felt that the board's interpretations of the Wagner Act and its general procedure have gone beyond what Congress intended and have not treated both sides impartially. More particularly, they have complained that the board's procedure does not give the employer an equality with his organized workers in the process of collective bargaining. On the other hand, some of these complaints have been remedied by judicial decisions which require the board to follow a more equitable procedure in certain instances. In any event, public opinion seems to have accepted the principle of collective bargaining as a sound one and controversies now relate almost wholly to the methods by which this principle shall be applied with equal justice to the parties concerned.

ACTIVITIES OF THE LABOR RELATIONS BOARD APPRAISED.

The Wagner Act was followed, in 1937, by another somewhat revolutionary national labor law. This is the Fair Labor Standards Act by which Congress sought once again to inaugurate various industrial reforms, such as the abolition of child labor and the establishment of a minimum wage, which twenty years earlier had been declared unconstitutional by the courts. Under the terms of this measure, industries are denied the right to ship goods in interstate commerce if minors under certain ages are employed. Enterprises engaged in interstate commerce, or whose goods enter interstate commerce, are required to pay employees a minimum hourly wage. The law also virtually fixes the maximum legal working week in such industries at forty hours and requires that extra compensation be paid for time worked in addition to this maximum. Certain classes of employees are excluded, however, from the provisions of the law. These include agricultural workers, employees in certain public-utility enterprises and the fishing industry, and certain persons in the higher-salary brackets. Administration of the law is entrusted, in part, to the children's bureau of the department of labor; but, mainly, it is the responsibility of new agencies in the same department known as the wage and hour and public contracts divisions. The provisions of the Fair Labor Standards Act apply not only to industries actually engaged in interstate commerce but to those which are producing goods which, sooner or later, are destined to be used in interstate commerce. This gives it a greatly widened scope and breaks down, as far as labor is concerned, the old distinction between manufacturing and commerce, which for many years marked the boundary line between state and federal jurisdiction. Nevertheless, the Supreme Court has upheld the act as a constitutional exercise of

THE FAIR LABOR STANDARDS ACT.

the power of Congress "to regulate commerce . . . among the several states." [1]

JOB-PROMOTION ACTIVITIES.

Another area of federal activity which expanded greatly during the later years of the economic depression was that of job-finding and job placement. As early as 1918, a federal employment service had been set up within the department of labor and, after a somewhat precarious existence, this service was given rank as a bureau and placed on more permanent foundations by congressional legislation in 1933.[2] Under the provisions of this act the states were encouraged by generous federal grants-in-aid to set up job services and local employment offices, and to collaborate with the federal employment service. Virtually all the states took advantage of this plan with the result that a nation-wide job-finding service was established. The United States employment service was transferred to the federal security agency in 1939; but, because of the exigencies of war, its activities were later merged with those of the war manpower commission, which had been created in 1942 to help utilize the nation's manpower to the fullest extent in the war effort. Local employment offices in the states were retained as agencies of the United States employment service, but the states lost all control over them and they became wholly federal in operation. Recently proposals have been made to return the local employment offices to the states, but even if this is done federal control is likely to be continued.

THE NATIONAL DEFENSE MEDIATION BOARD.

THE NATIONAL WAR LABOR BOARD.

Preparations for national defense and America's entry into the Second World War brought some new labor problems in connection with the support of the armed forces. An imperative need for uninterrupted national production resulted in the setting up of a national defense mediation board whose activities were intended to supplement those of the labor department's conciliation service in settling industrial disputes. Some months after the nation entered the war, this body was replaced by a national war labor board of twelve principal members and twenty-four alternates, so distributed as to provide an equal representation of labor, management, and the public. Created by executive order, this war labor board was given the responsibility of settling industrial disputes throughout almost the whole of the national economy. To this end it was empowered to use its good offices toward voluntary arbitration of disputes; but, if this failed, the board was given authority to appoint arbitrators whose decision

[1] United States *v.* Darby Lumber Co., 312 U. S. 100 (1941).
[2] Public Act 30 (June 6, 1933).

would be binding on the disputants. Later, the board was given powers of great importance in the matter of approving or disapproving changes in wage rates, this being part of the nation-wide endeavor to "hold the line" against inflation.[1]

LABOR DISPUTES IN WARTIME.

At the President's request, shortly after America entered the war, the great national labor organizations voluntarily renounced the right to strike — this pledge to remain effective for the duration. On the whole, the organizations lived up to their promises. Here and there, however, local strikes took place (sometimes in defiance of orders issued by union leaders) and the war labor board was virtually defied. In some instances, the board certified to the President its inability to end the strike, whereupon the establishments involved in the dispute were taken over and temporarily operated by the government. In nearly all such cases, the strike was terminated and work resumed pending further negotiations. Meanwhile, Congress proceeded to act. Over the protest of organized labor and by overriding the veto of the President, it enacted the Smith-Connally Labor Disputes Act of 1943. This act provided the war labor board with a statutory basis (it had previously rested on executive order). Likewise, it provided full authority for the seizure of plants wherever the war effort was being impeded by strikes, such plants to be temporarily operated by the government. Furthermore, the act prohibited strikes in government-operated plants and provided penalties for any violation of this ban. Then, going somewhat off its main track, the statute forbade labor unions to make contributions to political campaign funds. There were two flaws in this last interdiction, however, in that (according to a ruling from the attorney general's office) the act did not prevent the making of union contributions in support of candidates at primary elections, nor did it forbid voluntary contributions by individual members to political campaigns, even though these contributions are made en masse at the behest of union leaders.[2]

THE SMITH-CONNALLY ACT.

Following the Japanese surrender in August, 1945, the war labor board was abolished, most of the wartime machinery for handling labor disputes was abandoned, and "free" collective bargaining was reintroduced. The period of wartime regulation has not been detrimental to labor's cause. On the contrary, throughout the war years and for about a decade preceding America's involvement in the war, public policy has been highly favorable to labor.

LABOR'S FUTURE.

[1] See also p. 496.

[2] For example, contributions made through the Political Action Committee of the C I O in the campaign of 1944.

Federal laws have helped organized labor to strengthen its hold over industrial workers; they have made collective bargaining an almost universal requirement; provided tribunals for airing and adjusting labor disputes; and set national minimum standards for wages as well as a maximum work week. These gains have not been seriously lessened by war conditions, although the occurrence of wartime strikes and work stoppages have created a demand that labor organizations assume a degree of responsibility in keeping with their privileges, that they maintain free elections in their own ranks, follow a democratic procedure, avoid jurisdictional conflicts, keep their finances straight and make them public, and be more scrupulous in observing the provisions of the collective contracts made with employers. Unless these demands are met by organized labor itself, governmental regulation may be applied to labor as it has been to management. A trend in that direction is already discernible in that provision of the federal tax laws which now requires labor unions to file statements of their income.

INDUSTRIAL AND SOCIAL SECURITY

A LESSON FROM THE DEPRESSION OF THE 1930's.

The acute distress occasioned by mass unemployment during the years 1930–1935 and the huge emergency outlays, amounting to billions of dollars, which the national treasury was called upon to make in order to provide direct relief and various kinds of public work, offered persuasive arguments for the program of industrial and social security which Congress approved in the summer of 1934. Experience seemed to indicate that economic activity was cyclical and that periods of prosperity were followed by economic recessions in which production fell off and widespread unemployment ensued. That being the case, it appeared desirable to make such provision as would prevent the unemployed from becoming, in periods of depression, an emergency burden on the public treasury. Likewise, it was recognized that great numbers of industrial workers, when they reached an advanced age, could no longer be gainfully employed, even in times of economic prosperity. As many of these had made no adequate financial provision for this contingency they found themselves without means of livelihood and had to be assisted by private or public agencies. The same condition of social dependence existed in the case of widows with young children. Even before the close of the nineteenth century, some European countries began experimenting with schemes of social insurance and, in 1912, an unemployment insurance plan was inaugurated in Great Britain. In America, moreover, several of the individual states made a beginning along the

same lines during the first quarter of the twentieth century, limited for the most part to mothers' pensions and assistance to the blind or to persons otherwise handicapped.

THE SOCIAL SECURITY ACT OF 1935.

As a first step in framing a national program of social security, the President appointed a special committee which in due course submitted an elaborate report with some definite recommendations. These were embodied in the measure which Congress enacted as the Social Security Act of 1935. Administrative supervision over the somewhat complicated plans for social security provided in this act was entrusted to a social security board of three members appointed by the President for terms of six years. The board, originally placed within the department of labor but subsequently transferred to the federal security agency, is expected to assume a large measure of independence in its work. The law requires that members of the board shall engage in no other business, vocation, or employment during their terms of office.

THE VARIOUS TYPES OF SECURITY: 1. OLD-AGE PENSIONS.

Two classes of persons are involved in the old-age pension problem. The first are those aged persons who have already reached a time in life when they are no longer able to support themselves. The second class includes the young and active, those gainfully employed, for whom ultimate provision can be made through contributions from themselves and from their employers over a period of years. As respects the first class, the act of 1935 encourages the establishment of noncontributory old-age pension systems by the states, administered by the state authorities. A portion of the cost is borne by each individual state; but the national government matches all payments made by the states to needy persons, sixty-five years of age or over, up to a certain maximum per person per month, provided the state's old-age pension system conforms to certain federal requirements. In addition, the national government adds five per cent to its total grants as its contribution towards the administrative expenses of these pension systems. It should be noted, therefore, that this section of the social security act is based upon the expectation that each state will set up its own scheme of old-age pensions, paying to each qualified person whatever allowance it sees fit. The national government merely contributes half the cost of such payments up to a designated maximum, which is now twenty dollars monthly per person. There is no basis, therefore, for the common impression that there is any fixed maximum on the monthly sums which any state may pay. Let it be repeated, however, that the national government's contribution hinges upon the fulfillment by the state of certain nationally stipulated minimum admin-

istrative standards. For example, before any state can obtain the federal contribution, it must not only adopt a satisfactory old-age pension plan but must establish a state agency to administer it and work out a method of administrative procedure which meets the approval of the federal authorities. All the states have now met these requirements and are entitled to receive the federal government's contribution.

2. THE OLD-AGE INSURANCE SYSTEM.

For those gainfully employed who can still look forward to years of economic usefulness, the old-age pension plan is an entirely different one. In the first place, the national government assumes complete responsibility for establishing and administering it. In the second place, it is placed on a contributory basis, the beneficiaries being required to help support it. To this end employers are required to deduct a stipulated percentage from the wages or salaries of their employees every month and send it to the federal government. The employer is further required to match this with an equal amount, which he sends to Washington where it also is credited to the employee. At present, the amount thus jointly paid into the federal old-age annuity fund is 2 per cent, or 1 per cent by the employee and 1 per cent by his employer. The expectation is that these amounts will be increased until they jointly equal 6 per cent of the wages which the employee earns. These contributions are paid into a trust fund administered by a special federal board and the proceeds are invested in bonds issued by or guaranteed by the United States government. On reaching the age of sixty-five, each person for whom contributions have been paid over a term of at least five years will receive monthly benefits based upon his average monthly wage, or roughly according to contributions which have been made in his behalf.

IT BECOMES THE OLD-AGE AND SURVIVORS' INSURANCE SYSTEM.

Following amendments to the social security act in 1939, this old-age annuity system was broadened to include dependents and survivors of original beneficiaries; hence, the plan may be now more appropriately known as an old-age and survivors' insurance system. Additional benefits, equal to one half the amounts paid the insured worker, may be paid to his wife if she is beyond the age of sixty-five and to each dependent minor child; and lump-sum or monthly benefits may be paid to the members of the family of an insured worker who dies either before or after reaching pensionable age. But an important thing to remember about the entire contributory system is that many categories of workers are specifically excluded from its operation and are therefore not covered by its benefits. Among others, these include all domestic servants and agricultural workers, together with the employees of religious, philanthropic,

and educational institutions. It is probable, however, that these will soon be included. Political considerations were largely responsible for leaving them out of the original plan.

3. UNEMPLOYMENT INSURANCE.

The Social Security Act also provides for a system of unemployment compensation. This again is state-administered, with the national government providing part of the cost and a certain amount of administrative supervision. The national government assumes the obligation to pay to any state which adopts an approved unemployment compensation law "such amounts as the social security board determines to be necessary for the proper administration of such law," provided the total amount of such grants-in-aid does not exceed a designated sum appropriated for this purpose by Congress. But the arrangements for financing unemployment compensation are somewhat novel and provide an illustration of the growing complexity of federal-state relations. The Social Security Act levies a special federal pay roll tax upon every employer who has at least eight employees in his service and is not specifically exempted by law. The exemptions are substantially the same as those just mentioned in connection with contributory payments for old-age pensions. This tax is now 3 per cent of the annual wage or salary paid to each employee. But against this federal tax the employer may credit up to 90 per cent of the amount of any contributions which he may have paid into an approved state unemployment compensation fund. The purpose of this rather complicated arrangement is to encourage each state to set up an unemployment insurance scheme which meets with federal approval.

To obtain this approval, various conditions are laid down in the law. One is a provision that all moneys received by the state unemployment compensation fund shall be immediately paid over to the federal treasury. Thus, the entire proceeds from the levy upon pay rolls eventually go into a national unemployment trust fund, which is invested by the secretary of the treasury in obligations of the federal government. Payments for unemployment compensation are made out of this fund subject to the provisions of the federal laws and under administrative regulations which have been set up by the particular state involved. Each state and territory of the United States has now met the federal requirements and, in accordance therewith, has established an unemployment insurance system, with a total of more than forty million workers included.

4. MISCELLANEOUS PROVISIONS.

In addition to these various provisions for old-age pensions, old-age and survivors' annuities, and unemployment compensation, the Social Security Act makes arrangements for federal grants-in-aid to the states for the support of dependent

children. To secure these grants, a state must have its plan approved at Washington, and the giving of this approval is a responsibility of the children's bureau in the department of labor. Federal aid is also extended to the states in connection with maternal and child-health services, the care of crippled children, child welfare in general, and vocational rehabilitation. These arrangements, however, are merely a continuation or elaboration of the aid which the national government had been giving for a number of years before the enactment of the Social Security Act. But grants-in-aid are also being given under the terms of this law to strengthen the public health work of the various states and to help them in assisting the needy blind.

THE SOCIAL SECURITY SYSTEM APPRAISED.

The Social Security Act of 1935 is one of the most significant statutes ever enacted by Congress. It is based upon the idea that the support of aged workers, as well as the maintenance of the unemployed and the otherwise needy or destitute, should not be a matter of charity or dole-granting, but something to which both employers and employees should contribute. The burden thus placed on them is merely added to the cost of production and is thus ultimately borne by the consumer. The act of 1935 aims to place social insurance on what can ultimately be made a self-sustaining basis by increasing the joint contributions. Meanwhile, the Supreme Court has upheld in a series of decisions the constitutionality of this legislation.[1]

SOME CRITICISMS:

1. THE EXEMPTIONS.

Although few people nowadays would disagree with the general philosophy on which social insurance is based, there are some things which can fairly be said in criticism of the plan which Congress has provided for the workers of the United States. For one thing, there are too many exemptions. Farmers, household servants, workers in small industrial plants, and employees of charitable institutions — they grow old, or become unemployed, just as industrial workers do.[2] Why, then, should they be denied the right to qualify for old-age pensions and unemployment compensation? The answer is that they ought not to be, and that these exemptions will doubtless be eliminated very soon.

2. THE MIXED CHARACTER.

Another major criticism, coming mainly from federal administrators of the Social Security Act, is directed at the mixed federal-state character of the social security services. It is argued that the system is needlessly complicated by the multiplicity of national and state agencies involved and that the ultimate centraliza-

[1] Carmichael *v.* Southern Coal and Coke Co., 301 U. S. 495; Steward Machine Co. *v.* Davis, 301 U. S. 548; Helvering *v.* Davis, 301 U. S. 619.

[2] It was recently estimated (1944) that twenty million wage earners are excluded from the benefits of the Social Security Act. Twelve million of these are farm laborers.

tion of the entire machinery in federal hands would be advantageous. It is probably true, of course, that some gains in administrative efficiency, as well as some economies in the cost of administration, would be secured in this way; on the other hand, there are those who strongly object to the concentration of so vast a social enterprise in the hands of a single authority. They argue that, because of the great differences among the states, there should be a reasonable amount of flexibility in administration, which can only be obtained by allowing each state to decide for itself how far it will go above the minimum standards set by the federal authorities. There is no good reason, they say, why Massachusetts and Mississippi should be compelled to pay old-age pensions in exactly the same amount, inasmuch as the cost of living differs considerably in these two commonwealths. There is also the more general objection that the steady piling up of nation-wide functions at Washington may result in badly overloading this center of gravity. It might "induce apoplexy at the nation's capital and paralysis at the extremities, that is, at the state capitals," is the way someone has expressed it. Finally, the system is being badly undernourished by the present rate of contributions from employers and employees. It is a "contributory" system to only a small degree. Although the original intention was to raise the rate, year by year, from 1 per cent to 6 per cent of monthly wages, Congress has annually stalled this increase. Today — eleven years after the passage of the Social Security Act — the contributions are still fixed at 1 per cent.

CONCLUSION.

But, despite its various shortcomings, the existing system of social insurance represents a long step forward in the effort to solve a great and difficult problem. Social security aims at the abolition of poverty. The principal causes of poverty are old age, unemployment, accidents, and ill-health. These afflictions cannot be eliminated, of course, for old age will come inexorably; business will have its ups and downs, with consequent instability and unemployment; workers will get injured and will fall sick — no matter what we do. But society can at least see to it that the brunt of these afflictions shall not fall wholly on the worker and his family. The way to do this is by providing him with insurance in the way of an old-age pension, unemployment compensation, and industrial accident compensation — all of which he now has — together with health insurance, which will doubtless be our next step. Even with all this, there will still be some poverty in the land; but, in the long run, most of it will be gone. At any rate, that is the objective which systems of social security have in view.

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CHAPTER XXVIII

AGRICULTURE AND CONSERVATION

It will not be doubted that with reference either to individual or national welfare agriculture is of primary importance. In proportion as nations advance in population and other circumstances of maturity this truth becomes more apparent, and renders the cultivation of the soil more and more an object of public patronage. — *George Washington.*

THE FEDERAL GOVERNMENT AND THE FARMER.

The Constitution of the United States makes no mention of agriculture, although this was the principal vocation of the people in 1787. Consequently, it might be argued that the only formal authority possessed by the federal government in relation to the farmer is incidental to its taxing power and its power to regulate commerce. But it should not be assumed that, because of this, American agriculture has been the Cinderella of federal policy. On the contrary, the agricultural interest has strongly influenced national policy from the very beginning and has on many occasions been the beneficiary of special legislation enacted in its behalf. Agriculture, indeed, has been more often than any other interest the favored ward of the national government. And it is easy to understand why this should be the case, for during a large portion of the nation's history Congress was numerically dominated by representatives of the agricultural areas. Even today a majority in the Senate is controlled by states in which agriculture is the chief vocation of the people. With the rapid industrialization of various states during the past decade, however, the political strength of the farmer has been declining and, today, the industrial worker is replacing him as the object of the federal government's special solicitude.

There is a second reason why the agricultural interest, for a long time, exerted such a strong influence upon the course of national politics. It is to be found in the ability of the farmers to organize for their own protection. Not into regular labor unions did they combine, it is true, but into a regular political party, like the Populists of sixty years ago, or into the national organization known as the Grange or the Patrons of Husbandry. More recently, the farm bureau federation has been a power in Washington and there are few students of American history

who have not heard of the "farm bloc" in Congress. Disregarding party lines, this phalanx of senators from the agricultural areas can be lined up for the farmers' special interest at all times.

EARLY NATIONAL LEGISLATION:

To give even a general sketch of the federal government's activities in the field of agriculture since the first meeting of Congress in 1789 would take a whole volume. But some of the landmarks can be indicated here without going too far afield. One of them was the Homestead Act of 1862 — perhaps the most important statute in this field ever passed by Congress, if one considers its far-reaching effects upon the settlement of the West. By the terms of this act, anyone could acquire one hundred and sixty acres of land from the public domain by paying a nominal registration fee and becoming a bona fide settler on this land for a period of at least five years. Although various evils developed under the homestead system, it set the pattern of land ownership in much of the West — the farm of moderate size cultivated by its owner.

1. THE HOMESTEAD ACT.

2. THE MORRILL ACT.

Congress also enacted, in the same year, a statute known as the Morrill Act, which gave to each state, roughly in proportion to its representation in Congress, a sizable block of public land with a stipulation that the proceeds of its sale be used to support colleges of agriculture and mechanical arts. Many institutions of this type, sometimes known as "land grant" colleges, owe their origin to this statute.

The Morrill Act marked the beginning of a long series of federal enactments by which grants-in-aid to the states for the benefit of agriculture have been made during the past eighty years. In due course (by the Hatch Act of 1887) such grants were made to establish agricultural experiment stations operated by the states through their land-grant colleges. Further support to these colleges was later added in the form of annual appropriations; and, by the Smith-Lever Act of 1914, federal aid was provided for an agricultural extension service, operating chiefly out of the agricultural colleges and designed to provide the farmer with the assistance of agricultural specialists. This service has become personified in the local extension agent, or "county agent," as he is usually called. As an adviser to the farmer on agricultural problems of every kind and as a leader in rural betterment, the county agent has become an important constructive factor in the life of the farmer communities.

3. EXPERIMENT AND EXTENSION SERVICES.

For about a quarter of a century after the Civil War, the national government's activities in relation to agriculture were conducted through bureaus in the department of the interior, chiefly the bureau of animal

industry. But in 1889 the department of agriculture was established to take them over, and this department has steadily grown to a position of prime importance in the federal administration. Today, it includes within its jurisdiction a wide variety of services, all of which are related to agriculture in one way or another. Some of these have been already described.[1]

4. THE DEPARTMENT OF AGRICULTURE ESTABLISHED.

AGRICULTURAL MARKETING AND PRODUCTION CONTROLS

The primary aim of federal agricultural policy during the latter part of the nineteenth century was to improve the techniques of agricultural production, so that more could be produced from a given amount of land and labor. This policy yielded high dividends. The scientific work of the public authorities, the improvements in machinery, and the betterment of methods have combined to increase agricultural production in America to a point where, in normal years, it now exceeds the demand. Beginning with the First World War, however, federal assistance to agriculture underwent both an expansion and a change in direction. This was largely the result of two new problems for which the farmers were demanding solution at the hands of the federal government. One of these was the problem of agricultural credit; the other was the problem of agricultural prices.

NEW AGRICULTURAL PROBLEMS:

Down to this time the farmer, cattle raiser, fruit grower and dairyman had obtained financial credit, when they needed it, from the regular banks. Large numbers of them borrowed money at one season, when the crops were being sown, for example, and paid it back (with interest) at another season, when the products were marketed. They dealt chiefly with small country banks where interest rates were higher than in the large cities and where the credit facilities were limited. What the agriculturist wanted was a system of farm loan and agricultural credit banks, under the auspices of the national government, which would cater to his special needs. All this, and more, was provided for him by congressional action in ways which were explained in a previous chapter.[2]

1. FARM CREDIT.

The other problem, that of ensuring fair prices to the farmer for his products, was not so easy to solve. The primary cause of the trouble was the fact that agriculture had so steadily improved its methods that there was now a surplus in some lines. This could not be marketed except at prices which were below the fair-profit level.

2. FARM PRICES.

[1] See p. 225.

[2] See pp. 433–434.

Even during the years of prosperity which followed the First World War, the price level of some agricultural staples underwent a decline due to slackening of exports to European countries. On the other hand, the farmer's labor costs and the prices which he had to pay for industrial products did not fall correspondingly. In some cases they went up. This situation led to a demand that the government should support farm prices artificially by means of subsidies, direct or indirect. Back in 1929, Congress had passed an Agricultural Marketing Act which aimed to promote and finance cooperative marketing as well as to stabilize agricultural prices. But this measure did not prove adequate because, with the onset of the world depression in 1930, all agricultural prices declined badly, thus aggravating the already precarious condition of the farmer and bringing farm income down to its lowest point in many years.

DECLINE OF FARM PRICES AFTER WORLD WAR I.

THE AGRICULTURAL MARKETING ACT OF 1929.

Accordingly, in 1933, Congress enacted a more ambitious measure known as the Agricultural Adjustment Act. Its primary aim was to raise the prices which the farmer could obtain for his products, thus providing him with an income level which bore a reasonable relation to that enjoyed by other producers. To this end the secretary of agriculture was empowered to secure a reduction in the amount of agricultural products raised each year, so that the surpluses, which had operated to hold prices down, might be eliminated. This reduction was to be arranged, in the main, by making voluntary agreements with farmers, plantation owners, and raisers of livestock, whereby they would curtail production in return for cash payments from the national treasury. The money for these payments was to be obtained from processing taxes,[1] which, as explained earlier, were to be levied upon millers, textile manufacturers, meat packers, and others, who "processed" or made "finished goods" out of the products of the farm. As far as raising the prices of agricultural products is concerned, the measure seemed to be serving its purpose, in part at least, but in January, 1936, it was declared unconstitutional by the Supreme Court. The court refused to regard processing taxes as "taxes" in the proper sense, insisting that they were levies placed upon one class of citizens for the special benefit of another class, and declaring also that the Agricultural Adjustment Act was unconstitutional for the additional reason that it undertook to regulate a matter, namely, agricultural production, which fell within the reserved powers of the states.[2]

THE FIRST AGRICULTURAL ADJUSTMENT ACT.

THE A A A DECLARED UNCONSTITUTIONAL.

[1] See p. 246.

[2] United States *v.* Butler, 297 U. S. 1.

Undaunted by the fate which had overtaken this measure, Congress quickly passed the Soil Conservation and Domestic Allotment Act (1936) which, under the guise of a soil-conservation policy, attempted to secure, by indirect methods, a decrease in the production of certain staples. Three years later (1938), partly because this indirect system of production control was not wholly satisfactory and partly because the Supreme Court was now expected to be more favorable, Congress passed a new Agricultural Adjustment Act which was quite as far-reaching as the original act of that name. This time, however, there were no processing taxes. Administration of the new act, moreover, required a relatively greater degree of participation by state, local officials, and by farmers, than had the older act. Thus it avoided the shoals of unconstitutionality. These two basic measures, along with certain supplementary statutes and executive orders, established a comprehensive and intricate system of governmental regulation for agriculture and set up for this sector of the nation's economy a degree of public responsibility and direction unique in American history.

NEW LEGISLATION: 1. SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT.

2. THE SECOND AGRICULTURAL ADJUSTMENT ACT.

The purpose of the new legislation was still that of ensuring farmers a fair level of prices by controlling output. This was to be accomplished, and has been accomplished, as follows: through the device of a referendum, committees of farmers, operating under the supervision of state and local officials, establish local production goals for certain agricultural staples in accordance with the overall production requirements stipulated by the agricultural adjustment agency in the department of agriculture.[1] Participating farmers are then assigned specific acreage quotas, based on average past production, or marketing quotas for these staples. Cash payments may be made by the government to compensate for reduction in the farmer's income traceable to his cooperation with its program. In addition, payments may be made to farmers for adopting soil-conservation policies recommended by the government. These conservation payments may be offered to compensate him for reduction of output when the farmer allows fields, formerly tilled, to lie fallow or diverts acreage, formerly devoted to soil-exhausting crops, to the production of leguminous or soil-enriching crops.

AIMS OF THE NEW FARM LEGISLATION.

1. CROP-CONTROL PAYMENTS.

2. SOIL CONSERVATION PAYMENTS.

Still another feature of the 1938 legislation is the so-called "ever

[1] During World War II this agency was placed under the jurisdiction of the war food administration.

normal granary," which is simply the storage of surplus commodities under government auspices. These are then held to meet normal demand in years of abnormally low production or to meet unusual demands, as in time of war. The storage, under government auspices, is for the most part in public warehouses and elevators. On agricultural commodities thus taken over for storage, the government advances the producer a loan, which in certain instances is fixed as high as 90 per cent of "parity" — which is a figure supposedly based on a fair relation between the agricultural price level and the price levels in other fields of production. For the most part, it has been higher than the current market price of the surplus commodities. The expectation is that in times of scarcity these government-stored surpluses will be sold on behalf of the owner-farmer, thereby discharging his loan.

3. THE EVER NORMAL GRANARY AND GOVERNMENT LOANS ON SURPLUSES.

A tentative start has also been made in crop insurance. Beginning in 1939, cotton and wheat farmers were invited to take out policies with the federal government insuring them against the unavoidable hazards of production — the premiums for this insurance being paid chiefly in previous surpluses of the commodity insured. Indemnities, reckoned on the loss to production as gauged by previous crop yields, are also paid in the form of insured products, which are drawn from the surplus pools maintained by the government.

4. CROP INSURANCE.

The Second World War and the consequently augmented demand for farm products caused much of this farm program to be suspended. In many instances, instead of curtailing production, the war food administration and subsidiary agencies promoted its expansion. General wartime rationing of foods and fibres, special government purchasing of farm products for wartime needs, and universal price controls — all this made much of the special farm program unnecessary or inapplicable. But the restoration of peacetime conditions will probably see various features of this program restored to full operation. For better or for worse, the production and distribution of staple farm commodities appear to have become a more or less regimented feature of American economic activity.

WARTIME SUSPENSION OF THIS PROGRAM.

From time to time in recent years, moreover, various ways of expanding agricultural markets, and thus helping the farmer, have been tried. Prior to the outbreak of the war, for example, the government undertook to "dump" on the world market certain of its stored surpluses and to provide export subsidies for other agricultural commodities. The outbreak of hostilities ended this, temporarily at least. Efforts have also been made to

ADDITIONAL FEDERAL SUPPORT OF FARM MARKETS.

dispose of the surplus commodities by channeling them through relief agencies, by distributing them in aid of free school-lunch programs, and by a so-called food stamp plan. Under the latter plan, low-income or relief families were, for a time, permitted to obtain without cost certain foodstuffs which were declared to be surplus products. The lend-lease arrangements with various friendly countries during the war also drew upon the government's stock of surplus foodstuffs in certain lines and continued to do so, even after actual hostilities in Europe ceased. From what has been said in the foregoing pages, it is reasonably evident that the federal government has made a sincere and aggressive effort to get the American farmer out of his difficulties.

OTHER AIDS TO THE FARMING COMMUNITY

A difficult agricultural problem to which the federal government has recently turned its attention is that of farm tenancy. One may be surprised to learn that in a country where farm ownership is taken as a matter of course, more than half of those who till the soil do not own it. To ameliorate the condition of these tenant farmers, Congress in 1937 passed the Bankhead-Jones Act. This act makes it possible for tenant farmers and sharecroppers to secure low-interest, long-term government loans wherewith to purchase family-type farmsteads, farm animals, and agricultural equipment as well. Many thousands of applicants have received such loans. More ambitious programs of a related nature were inaugurated at one time or another during the later years of the depression in the thirties. These included federal loans and grants for the rehabilitation of farm families who had become victims of drought or depression; the construction of model agricultural communities; the buying up of exhausted or submarginal lands and the resettlement of the former proprietors; and even the federal subsidization of medical care for farm families in certain communities.

BANKHEAD-JONES FARM TENANT ACT.

OTHER FARM SECURITY MEASURES.

Steps were likewise taken in 1936 to encourage the farm use of electric power by the enactment of the Rural Electrification Act. Relatively long-term loans at low rates of interest are extended to municipalities, cooperative associations, corporations, or individuals, for the construction of generators or electric transmission lines for rural areas not otherwise served; and further loans are made to these borrowers to finance the purchase of electric appliances. Loans may also be obtained by firms or individuals who are engaged in the business of supplying electrical equipment for rural use. It should be

RURAL ELECTRIFICATION.

mentioned, however, that the act does not provide loans to the actual consumer of the electrical energy, the farmer himself.

PRESENT STATUS OF THE FARMER.

From all this, it would seem that, far from being the individualist par excellence that he is often assumed to be, the American farmer is becoming one of the most highly regimented producers in the entire national economy. His production is planned, the prices of his staple commodities are controlled, his surplus products are taken off his hands by the government, his markets are protected, and a system of agricultural credit has been set up for his special benefit. This regulatory legislation is defended on the ground that agriculture is still the principal basis of the country's economic life and that the farmer's well-being is intimately related to the welfare of the nation as a whole. To maintain agricultural prosperity, it is essential that a reasonable equilibrium between the demand for farm products and the supply of such products shall be maintained; and this, it is argued, can only be done through government supervision. Those who are familiar with the Washington merry-go-round will add, however, that the political influence of farm organizations has been quite as potent as the foregoing arguments in getting the farmer what he wants.

CONSERVATION OF NATURAL RESOURCES

IN GENERAL.

Some of the measures which are designated as "agricultural" carry a suggestion of purposes beyond the promotion of the farmer's immediate welfare. This is particularly true of laws designed to preserve soil fertility and to apply land to the uses for which it is best adapted. Such aims are part of a program to conserve natural wealth generally; in other words, one which seeks to ensure a planned and efficient use of natural resources, the discouragement of wasteful exploitation, and the restoration of such resources where they have been dissipated, as, for example, by soil erosion.

EARLY INDIFFERENCE TO NEED FOR CONSERVING NATURAL WEALTH.

Until less than fifty years ago, very little attention was given to this matter of conservation. Vast forest acreages, huge deposits of coal, abundant petroleum resources, mineral wealth of all sorts, and vast tracts of virgin land were still inviting exploitation throughout the nineteenth century. This gave rise to a popular impression that the natural wealth of the United States was virtually inexhaustible. A moment's reflection would have shown the groundlessness of this optimism, but unhappily there were few who stopped to reflect. The men and women who achieved the economic conquest of a half continent during this great century were individualists of an exceedingly rugged type, the product

of the ever-advancing frontier. The frontier spirit did not lend itself to social or economic planning. In the new communities, every family was supposed to do its own planning, to look out for itself — and the devil take the hindmost. Under such conditions no great solicitude was manifested for the interests of posterity. The temper of the nineteenth century in this matter was sometimes embodied in the cynical query, "What has posterity ever done for us?"

FIRST STEPS TOWARD A CONSERVATION POLICY.

Not until the first decade of the twentieth century were the first official steps taken to remind the public that our resources, however vast, were not inexhaustible and that the consequences of unplanned and unrestricted exploitation would some day be serious. The men responsible for this reminder were a small group of administrators around President Theodore Roosevelt. Under his enthusiastic leadership, this group made more effective certain rudimentary conservation measures which were already on the statute book and also intitiated several new ones. The latter related chiefly to the reclamation of arid lands, the transfer of national forest reserves to the trained personnel in the department of agriculture, as well as the reservation of mineral and other rights in public lands then open to private "entry" and ownership.[1] The policies thus begun have been continued and intermittently expanded until, today, the United States may be said to have something approaching a comprehensive national conservation program.

FORESTS.

In a sense, the national conservation movement may be said to have been first inspired by the concern felt over the fate of our forests; and it is in the preservation and restoration of forest lands that perhaps the greatest progress has been made. The forestry service of the department of agriculture now controls and administers one hundred sixty national forest preserves, covering an area appreciably greater than the present territorial extent of the thirteen original states. In this area its responsibilities include protection against fire and arboreal diseases, the regulation of grazing rights, and the supervision of the production and withdrawal of timber. The service also plays a vital part in reducing floods, preventing soil erosion, and protecting water supplies — all through its scientific management of watersheds. State and local forestry supervisors and private owners of forests and woodlands benefit from the work of the various experiment stations maintained by the forestry service, as well as from the aid extended them in applying the principles of forest management, in fighting insect pests and disease, and in carrying out reforestation and afforestation programs.

[1] See Theodore Roosevelt, *An Autobiography* (New York, 1926), pp. 393–422.

Closely identified with forest conservation have been the various policies pursued in relation to the land itself. The federal public lands, referred to earlier in this chapter, which once embraced an imperial domain, have been gradually transferred to the states, to railroad interests, to homesteaders either by sale or "free entry," and to other private owners. In that way the federal government, first and last, disposed of more than a billion acres. But, as the supply of "free land" diminished, various restrictions were placed upon free entry, while large reservations were set aside for permanent public ownership. Finally, in 1935, all private acquisition of such lands came to an end and the federal government announced that what remained of the original public domain would be held in perpetuity as a public reserve. The area which is thus set aside, consisting chiefly of national forests, national parks, grazing districts, and Indian reservations, now totals about four hundred million acres.

THE PUBLIC LANDS.

It was on its public lands that the federal government took its initial steps to protect water power and mineral resources. This it did by licensing the use of hydroelectric power sites and by reserving, or strictly regulating, the withdrawal of mineral deposits — a form of conservation which has been greatly expanded. The federal power commission, as indicated earlier, now fixes interstate rates on electric power generally, controls the export of power, and leases hydroelectric power sites on federally-owned areas to private companies — normally with a proviso that the lease shall run for a definite period and that the government may then recapture all improvements by paying a fair price. The Natural Gas Act of 1938 has also given the commission regulatory authority over the transportation and sale of natural gas.

WATER POWER AND NATURAL GAS.

As regards the oil reserves of the country, over which growing concern is felt as a result of the enormous drain occasioned by the war effort, effective protection has come only recently. The national recovery legislation of 1933 authorized the President to prohibit the transportation of oil in interstate or foreign commerce in excess of production or marketing quotas, fixed by oil-producing states; but this arrangement was held unconstitutional by the Supreme Court as being a delegation of legislative power to the executive branch of the government.[1] Thereupon Congress itself passed an act which carried into effect substantially the same policy which it had previously directed the President to pursue. The unprecedented wartime demand for petroleum products naturally suspended most of the limi-

OIL AND COAL.

[1] Panama Refining Co. *v.* Ryan, 293 U. S. 388 (1935).

tations on output; but the use of oil products was strictly regulated during the war period by a petroleum administration headed by the secretary of the interior. Now that peace has returned, however, it is anticipated that the federal oil legislation which is already on the statute book, strengthened by appropriate cooperation from the oil-producing states, will go far to supply a needed check on the wasteful exploitation of this underground wealth. In 1933, the federal authorities also interested themselves in a general program of coal conservation, particularly with respect to bituminous, or soft, coal. As mentioned elsewhere, the Guffey Coal Act of 1935 provided a code of fair practices for the soft-coal industry, somewhat like that projected for all business under the National Industrial Recovery Act of 1933. Following the Guffey Act's invalidation by the courts, a new act of somewhat similar purport was passed in 1937, and this remained in effect until it lapsed in 1943.

RIVER VALLEY DEVELOPMENT: THE T V A.

Meanwhile, conservation on its broadest scale has become identified with federal development programs such as the one carried out in the basin of the Tennessee River under the auspices of the Tennessee Valley Authority. Although the chief products of this agency are hydroelectric power and fertilizers, the indirect results of its activity have been a large number of flood-control works, reforestation, and the prevention of soil erosion. Consequently, the supporters of the T V A claim that its work has raised the whole level of agriculture in this region and benefited all classes of the population. They draw an analogy between this federal project and the internal improvement program (including the construction of canals, roads, and bridges) which the national government promoted during the earlier years of the nation's history. On the other hand, the Tennessee Valley and similar large hydroelectric enterprises, built and operated by the federal government, have been made the target of much criticism. It is asserted that the way in which their accounts are kept enable them to show more profit than they really make, that (through tax exemptions) they unfairly compete with private utilities, and that their managements are influenced by political considerations.

ACTIVITIES OF THE RECLAMATION SERVICE.

The Tennessee Valley project and the somewhat similar one at Bonneville in the Columbia River basin may be regarded as large-scale expansions of the activities which the reclamation service in the department of the interior has been carrying on for forty years or more. Originally, its efforts were limited to the western states, where it constructed dams and canals (financed from the sale of public lands) merely to provide water for

irrigating arid and semiarid farm lands. In more recent years, however, its construction work, such as the Boulder and Grand Coulee dams, has been designed not simply (or perhaps even mainly) to provide water for irrigation, but to supplement the water-supply requirements of adjacent cities and towns, to utilize latent hydroelectric power, to improve navigation, and even to conserve wild life. In cooperation with the department of agriculture and other federal agencies, the reclamation service has also carried out water-conservation projects to rehabilitate farmers and communities in the "dust-bowl" area of the Great Plains following the devastating droughts of the thirties.

CONSERVATION A COOPERATIVE EFFORT.

The land, the natural wealth locked within or found upon its surface, and the promise of wealth which can be realized from the land, are man's greatest material heritage. To conserve and protect this heritage, to use it in harmony with Nature and her laws, constitute a responsibility which each generation owes to itself and to those who come after. But this responsibility cannot be left entirely to the individual, for much of what is sought by conservation cannot be readily translated into terms of individual advantage — or, at any rate, cannot be translated into direct material profit. In the case of forest restoration, for example, it takes many years for the results to be realized and the profits to become available. Hence conservation, if it is to be effective, must be to some extent a governmental responsibility; and the national government has used its powers over interstate commerce, over navigable waters, and over the publicly owned domain, as well as its system of grants-in-aid to the states, in order to carry out this responsibility.

All this is not to deny that cooperation from private owners should be enlisted, and indeed such cooperation is essential to the success of any conservation program. Federal conservation practices were originally limited, for the most part, to the lands which the government owned; today, the active help of farmers and other landowners, and of state and local governments, is being vigorously sought; and, in this broadened scope of federal activity, one finds the best hope that the natural resources of the United States will be conserved for future generations.

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CHAPTER XXIX

THE POSTAL AND MISCELLANEOUS NATIONAL POWERS

Neither rain, nor snow, nor heat, nor gloom of night can stay these couriers from the swift completion of their appointed rounds. — *Herodotus.*

Of the great powers exercised by Congress, the most important have been discussed in the preceding chapters. But there are various other functions which belong to the federal government, secondary functions they may be termed, although some of them have grown to be of considerable significance.

THE SECONDARY FEDERAL FUNCTIONS.

Among these secondary powers given to Congress by the Constitution is the right "to establish post offices and post roads." "No other constitutional grant," as one writer has remarked, "is clothed in words which so poorly express its object or so feebly indicate the particular measures which may be adopted to carry out its design." [1] The reason, no doubt, is that the framers of the Constitution merely sought to perpetuate in central hands a power which was already there and which, in its actual workings, was well understood by everybody. For the postal system of the country is older than the federal government itself. Its origins date back into colonial times. During the Revolution the service continued to function; and, after peace had been arranged, it was somewhat improved by the congress of the confederation.[2] This early service, however, was costly, inefficient, and slow. In 1776 it took twelve days and cost forty cents to send a letter from Philadelphia to Boston by mail coach. In 1946 it costs only eight cents and takes a few hours by airplane.

THE POSTAL SERVICE.

The right to continue the existing post offices and to establish new ones was therefore given to the federal government as a matter of course. In addition, Congress was authorized to build and maintain post roads so that the carrying of the mails might be facilitated. The new government took over a relatively small

GROWTH AND FUNCTIONS.

[1] J. N. Pomeroy, *An Introduction to the Constitutional Law of the United States* (10th edition, Boston, 1888), Section 411.

[2] Benjamin Franklin served for a time as postmaster general and did much to better the service.

enterprise which has now become the largest single business in the world, with an annual turnover exceeding a billion dollars. For the United States postal service does not confine itself to the handling of mail, although that continues to be its principal function. It also conducts a parcel-post system, provides a money order service, and operates a savings bank.

Apart from all this, the post office department exercises a considerable degree of control over certain lines of business by virtue of its power to refuse the use of the mails to any concern which has been found to use the service fraudulently. Many years ago the Supreme Court sustained the right of postal authorities to exclude from the mails any matter that they deem objectionable — the sending of lottery tickets, for example. Congress has delegated to the postmaster general the power to determine what matter shall be so excluded, and the exercise of this delegated authority is not subject to review by the courts save in certain instances. The denial of the right to use the mails is not a deprivation of property, for no one can acquire a right in postal facilities that would be paramount to the proper management of the service.[1]

"FRAUD ORDERS."

Through the exercise of its postal authority, moreover, the federal government is able to facilitate the enforcement of the national laws. For example, these laws provide that no newspaper or magazine shall be allowed the privilege of second-class mailing matter if it contains any paid political advertising which is not plainly marked as such. Congress could not require newspapers of local circulation to refrain from publishing unlabeled political advertising, but it can make such newspapers pay higher rates for the use of the mails. Likewise, there is a requirement that newspapers and magazines shall publish twice a year the names of their editors and owners. Nothing happens to a newspaper which refuses or neglects to publish this information, except that it loses the right to be "entered as second-class matter." Newspapers and magazines of general circulation cannot afford to lose this privilege.

AN AGENCY OF REGULATION.

This power to deny second-class mailing privileges, upon which magazines and newspapers of regional or national circulation depend, can also be used to exercise an indirect censorship of the press. The power has, in fact, been invoked to deny mailing privileges to certain magazines of national circulation on the ground that they carried immoral or obscene matter. Al-

MIGHT REGULATION LEAD TO CENSORSHIP?

[1] For a survey of the postal authority in its legal phases, see Lindsay Rogers, *The Postal Power of Congress* (Baltimore, 1916), especially Chap. vii.

though such action may be justified as a means of safeguarding public morals, there is always a danger that the ban might be extended to deny the mailing privilege, ostensibly for the protection of public morals, when the real reason is a desire to throttle a publication which is too critical of the governmental authorities. Any reader of various well-known American magazines will agree that they occasionally overstep what prudish folk regard as the limits of decency. On the other hand, it was hardly the intent of Congress to invest the post office department with the functions of a watch-and-ward organization.

PARCEL POST.

Much controversy preceded the establishment of the parcel-post system in 1912. On the one hand, the national flow of trade was hampered by the relatively high rates charged by express companies on small shipments; hence, there developed a widespread popular movement for a system whereby packages of moderate size could be shipped by mail. On the other hand, there was vigorous opposition on the part of country storekeepers who feared that the mail-order houses in the large cities would profit most from a parcel-post system. In the end, Congress decided to authorize extension of the postal service into this field and thereby give a greater stimulus to interstate retail trade.

POSTAL SAVINGS.

About the same time (1910) the postal savings system was also established. By this arrangement every important post office became a savings bank. Deposits by any one individual up to a certain total are permitted and these draw interest at a designated rate. The United States guarantees such deposits in full. Since its establishment the system has grown year by year and it had a particularly rapid growth during the months which preceded the banking collapse of February, 1933. When people became nervous about the banks, they transferred their savings to the post offices.

THE AIR-MAIL SERVICE.

The beginnings of the American air-mail service go back only to 1918, when a route between Washington and New York was established. In the course of the next dozen years, however, nearly all the larger cities were given the new facilities. At the outset the government owned and operated this service directly, but with its rapid expansion the policy of awarding contracts for carrying the mails was adopted. Various companies were awarded these mail-carrying contracts in the hope that commercial aviation would thereby be encouraged. In 1933, on the allegation that some of the payments were exorbitant and had been obtained by reprehensible methods, all air-mail contracts were suddenly canceled. For a short time the air-mail was flown by army planes, but this proved unsatisfactory and new contracts with companies, at lower rates, were subsequently arranged.

The power to establish and maintain "post roads" is an authority which has thus far been drawn upon to only a small extent, yet it might well be utilized to amplify considerably the functions of the federal government. The original intention was merely to vest in Congress the right to build and maintain roadways if that should be necessary to expedite the carrying of mail from one town to another. But mails are not now, for the most part, carried by wagon or even by motor trucks; they are handled by the railways and, to a growing extent, by airplanes. To interpret the term "post roads" as including railways and landing fields does not involve a greater stretching of a constitutional phrase than the Supreme Court permitted when it included telegrams and telephone messages within the word "commerce."

HOW FAR DOES THE POSTAL POWER EXTEND?

DOES THE PHRASE "POST ROADS" INCLUDE RAILROADS?

In his message vetoing the Cumberland Road Bill in 1822, President Monroe asserted that Congress had no power under the Constitution to embark upon the policy of highway construction by virtue of its postal authority, but that the postal service must use the existing roads provided by the states. That doctrine, however, has long since been repudiated. The power of Congress to construct roads within the limits of the states has been held by the Supreme Court to be implied not only in the "post roads" clause of the Constitution but also in the authority to regulate commerce.[1] Congress, if it does not choose to build the roads as a national enterprise, may grant subsidies to the states for roadbuilding and this it has done in recent years. By the Federal Highway Act of 1916 and later enactments it has agreed to join the states in building certain main highways on a fifty-fifty basis.[2]

THE SUPREME COURT'S ANSWER.

OTHER POWERS AND FUNCTIONS

The framers of the Constitution realized that to facilitate the development of industry and trade throughout the various states it would be necessary to have not only a uniform currency but a uniform system of weights and measures. The power to fix the standards for such a system was therefore given to Congress. Contrary to a popular impression, however, the federal government does not concern itself with the enforcement of its own standards or with the inspection of weights and measures through-

1. THE REGULATION OF WEIGHTS AND MEASURES.

[1] California *v.* Central Pacific R.R. Co., 127 U. S. 1 (1888).

[2] For a discussion of this system of federal grants-in-aid towards roadbuilding see Austin F. Macdonald, *Federal Aid* (New York, 1928).

out the country. Congress, by law, has established certain standards of length, mass, and capacity, but it has left to the states the entire responsibility for seeing that these standards are accurately and honestly used. The national bureau of standards in Washington is the custodian of the primary national standards, but it supplies the various states with replicas of mathematical exactness. These standards relate not merely to pounds, inches, gallons, and the other measures of ordinary business, but to all sorts of technical units as well.[1]

WHAT THE INSPECTION COVERS.

The inspection of weights and measures, on a basis of their conformity to these standards, is chiefly in the hands of the municipal authorities, but their work is usually performed under the supervision of state officials. This work of inspection, moreover, is by no means confined to the weighing apparatus which reposes on the counters of retail stores — as the average citizen seems to imagine. It extends over a wide range, including milk jars, gasoline pumps, taxicab meters, electric, gas, and water meters, jars and containers of a hundred varieties, as well as every kind of weighing device from railroad scales to the delicate balances which are used in the prescription departments of drug stores. The old English standards (pound, bushel, yard, gallon, and their derivatives), somewhat modified, are in general use throughout the country, as everyone knows; but it is not so generally known that the metric system was also legalized by Congress more than fifty years ago and may be used by those who prefer to do so. Thus far, however, its use has been confined to laboratories and other technical establishments.

2. POWER TO GRANT PATENTS.

Congress is also given power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," in other words, to grant patents and copyrights. A patent is a certificate given to an inventor, securing for him during a designated term of years the exclusive right to make such profits as there may be in his invention of "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof." The issue of patents is in the jurisdiction of the patent office, a bureau in the department of commerce. The rules relating to them are elaborate and complicated.[2] A patent is valid for seventeen

[1] An interesting popular description of what the national bureau of standards is doing may be found in Frederic J. Haskin, *The American Government Today* (New York, 1935), pp. 164–174.

[2] Here are a few general provisions: The applicant for a patent must make a sworn statement that he believes himself to be the original inventor of the article or process which he seeks to patent; he must submit descriptions and drawings, also a model if required; and must pay a fee. Not everything new can be patented; it must be both "new and useful." It must be

years, during which time the holder can invoke action by the courts against infringement. But the issue of a patent does not protect the owner against suits on the ground that his patent infringes some earlier one. Neither does the government assume any obligation to protect the patents which it grants. The holder of a patent must do his own defending in the courts if he encounters an infringement. This sometimes leads to an unequal contest between the inventor and some large corporation which seeks to obtain, without paying for it, the article or process which has been patented.

3. TRADE-MARKS.

Trade-marks have no necessary relation to inventions or discoveries and do not come within the power to issue patents or copyrights. But trade-marks used in interstate commerce may be registered at the patent office. When intended for use in trade within a single state they can be protected only by state registration.[1] It should be mentioned, moreover, that the granting of a patent or trade-mark does not give anyone the right to manufacture or to sell his wares except under such conditions as the laws of the state may impose. Even patented articles, if dangerous to the safety, health, or morals of the community, may be excluded by the laws of any state. The imposition by the states of a license fee for the sale of any article, moreover, applies as well to patented merchandise as to any other. The right to manufacture or sell is not derived from the granting of a patent or trade-mark and is neither increased nor diminished thereby. Similarly, the fact that an article is patented does not give anyone the right to market it under conditions which unreasonably restrain trade and, hence, are in violation of the anti-trust laws.

4. POWER TO ISSUE COPYRIGHTS.

A copyright secures exclusive rights to publish and sell any book, magazine, newspaper article, manuscript, musical composition, drawing, map, cartoon, photograph, or similar matter having inherent value. The present term of a copyright is twenty-eight years with the opportunity for a further renewal during a similar term. To obtain a copyright in the United States, a book must be actually typeset in this country; but this does not apply to books in languages other than English.[2] Copyright includes all rights of translation, public performance, or dramatization, hence it carries the motion-

something "not patented or described in any printed publication in this or any foreign country prior to the invention and not in public use or on sale in the United States for more than two years prior to the application." When applications come in, they are referred to examiners in the patent office, and if a patent is issued, another fee is exacted.

[1] W. D. Shoemaker, *Trade-Marks* (2 vols., Washington, 1931) is the standard treatise on this subject.

[2] Application for copyright is made to the librarian of Congress. The fee is only one dollar, but two copies of the copyrighted publication must be given to the library.

picture rights to a book of fiction or other publication. Likewise it protects against the broadcasting of copyrighted music. Those whose copyrights are infringed have a recourse to the federal courts for an injunction or for damages. Many attempts have been made to secure some form of international copyright so that an author may have protection in all countries, and considerable progress in this direction has been made by means of treaties.

5. POWERS IN CONNECTION WITH NATURALIZATION AND BANKRUPTCY.

Congress has power to establish uniform rules upon two other subjects, naturalization and bankruptcy. The procedure in naturalization has been already explained.[1] As regards bankruptcy, in other words the making of provision for the distribution of a debtor's assets among his creditors after he becomes insolvent, Congress has not assumed jurisdiction to the exclusion of the states; but where any state law conflicts with a provision of the National Bankruptcy Act of 1898 as subsequently amended, such state law becomes invalid. The present national law is so elaborate, however, that little room is left for state legislation on this subject. It provides for both voluntary and involuntary petitions in bankruptcy. In the former case, the insolvent himself files a petition in a federal district court and officials are appointed by the court (sometimes on the recommendation of his creditors) to take over his assets; in the case of involuntary bankruptcy the petition is filed by one or more of the insolvent's creditors. After the assets have been liquidated, the insolvent may, under certain conditions, obtain from the court a discharge from bankruptcy, which relieves him of further legal liability with respect to ordinary debts unpaid at the time of filing the petition. For the security of credit it is obviously desirable that the rules relating to bankruptcy should be uniform throughout the country.

LIBERALIZATION OF THE BANKRUPTCY RULES.

An economic depression always increases the number of bankruptcies. Business men, farmers, corporations, and even municipalities, find themselves unable to meet their obligations on time and have to seek some arrangement with their creditors. Failing this, they are forced into bankruptcy. Corporations, in such cases, are usually placed in receivership, that is, they are operated by a person or persons appointed by the court for that purpose. In the endeavor to mitigate the financial hardships due to this situation, Congress amended and extended the National Bankruptcy Act by a series of measures between 1933 and 1940. This supplementary legislation provided special relief for heavily indebted agriculturists and also to railroads as a means of keeping them out of the hands of receivers.

[1] See p. 84.

Similar relief was provided for municipalities and other local government areas, including taxing districts. These concessions enable them to readjust their outstanding obligations, with the approval of the court, providing a certain proportion of the bondholders or other creditors agree to the readjustment.

MORTGAGE MORATORIA.

Likewise, the Frazier-Lemke Bankruptcy Amendment, passed by Congress in 1934, provided that any farmer who petitioned to be adjudged bankrupt might retain his property, even though he could not satisfy the claims of his creditors against it. Instead, he would be allowed by the court to pay, during a period of six years, a reasonable rental based upon the appraised value of the property, this rental to go to his creditors after payment of taxes. The Supreme Court in 1935 declared this arrangement to be unconstitutional as a deprivation of property without due process of law, whereupon Congress in the same year passed a farm moratorium law designed to meet these judicial objections, and the new law was subsequently upheld by the courts.[1]

6. POWERS IN RELATION TO THE HIGH SEAS.

"To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations" is another power granted to Congress. The high seas are the waters outside the three-mile limit, or, to speak more accurately, beyond the distance of one marine league from shore. International law recognizes that the territorial jurisdiction of any country extends to this distance from its shores, but beyond the three-mile limit, the salt waters of the earth are the "high seas," in which all nations have equal rights and over which all are free to travel in time of peace without restriction. By treaty, however, nations may agree on a widening of the three-mile limit for certain purposes, for example, in the case of vessels suspected of smuggling or rum-running. The United States, during the prohibition era, made a treaty with Great Britain, by the terms of which British vessels could be halted and searched if within one hour's steaming distance of the American coast. Over American vessels on the high seas the federal government has sole jurisdiction.

PIRACY AND UNNEUTRAL ACTS.

Piracy is now, for the most part, a thing of the past. It was the offense of committing forcible depredations on the high seas without color of authority derived from any government — the equivalent of brigandage on land. Regarded as the common enemy of all mankind, a pirate could lawfully be captured by anyone on the high seas and punished in any country. That is still the rule of international law, although pirates no longer show their grim visages

[1] Wright *v.* Vinton Branch Mountain Trust Bank, 300 U. S. 440 (1937).

except in melodrama. Offenses against the "law of nations" or against the rules of international law are nowadays, for the most part, breaches of neutrality. Congress has defined the duties of American citizens when other countries are at war and forbids the commission of unneutral acts on American territory, as, for example, organizing armed expeditions or fitting out armed vessels in aid of a belligerent power. Such "offenses against the law of nations" are punished by the federal courts. The rules of international law are not always exact and definite, although most of them are sufficiently so to permit their being properly applied. But international law, unlike the law of a single country, has no single tribunal with authority to enforce it.[1] The federal courts of the United States apply the rules of international law only where the controversy comes within American jurisdiction.

7. EXCLUSIVE JURISDICTION OVER THE NATIONAL CAPITAL.

The question of a national capital gave the makers of the Constitution some trouble. The prize was coveted by various cities, both North and South, and the members of the constitutional convention did not dare make a decision. To avoid an embarrassing difficulty, therefore, the whole matter of selecting a capital was left for Congress to decide after the Constitution should go into operation. It was felt that an entirely new city should be founded to serve as the seat of national government, and with that idea in mind provision was made for creating a small district completely under national control. Congress, in establishing the District of Columbia, availed itself of this power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The jurisdiction of Congress over this area is complete.[2] The District of Columbia has no system of local self-government, and Washington is the only large municipality in the country of which that can be said.

EXPANDING FEDERAL AUTHORITY

ARE THE POWERS OF CONGRESS ADEQUATE?

Reviewing the various constitutional powers of Congress which have been outlined in the foregoing chapters of this book, one may ask the question: are these powers adequate for what the country expects the federal government to do? In a strict sense they are not, but as a matter of governmental actuality they are rapidly becoming sufficient. Step by step, one after another,

[1] There is a World Court, or Court of International Justice, established under the auspices of the United Nations, but it has jurisdiction over only such international controversies as are submitted to it.

[2] For a description of the government of the national capital, see Chapter XXXIII.

new powers have been assumed by the federal authorities and their action has usually (although not always) been upheld by the courts. As a result of this expansion the people of the United States have been brought far more intimately into contact with the federal government than the framers of the Constitution could ever have imagined. This is particularly true of economic activities. The small endowment of economic authority which the statesmen of 1787 gave to Congress has enabled it, with the lapse of time, to exercise a vast amount of control over the interests of agriculture, trade, communication, banking, credit, and business organization throughout the length and breadth of the land.

THE ARMY OF NATIONAL OFFICERS.

In early days the work of the national government was chiefly centered in Washington. Apart from postmasters and collectors of customs there were very few federal officers and employees located anywhere else. Even in peace time one now finds them in large battalions all over the country. There are forest rangers, agricultural agents, bank examiners, railway mail clerks, immigration inspectors, collectors of internal revenue, income tax examiners, appraisers, public works engineers, and officials of endless other varieties, whose total number runs into the hundreds of thousands. They are the incarnation of a government whose functions are growing like dandelions in springtime. Nor is there any likelihood that this expansive process is nearing its end. On the contrary, the national government has discovered, and is now utilizing, a new channel for widening the scope of its activities.

GRANTS-IN-AID: A NEW DEVICE FOR PROMOTING CONGRESSIONAL POWERS.

This is the system of federal grants-in-aid to the states. It is not really a new device, because Congress has used it in sporadic instances for nearly a hundred years. But since the turn of the twentieth century the practice of making grants-in-aid has been considerably extended. In brief, it is a scheme by which the national government offers to match the states, dollar for dollar, or on some such basis, in promoting enterprises which are properly within state jurisdiction but need to be speeded up. Thus the Weeks Act of 1911 undertook to expedite the work of forest-fire prevention by this method of federal subsidizing. Three years later the Smith-Lever Act made a fifty-fifty provision for instruction and demonstrations in agriculture and home economics. The Federal Highway Act of 1916 extended the plan to rural roadbuilding, and a year later the Smith-Hughes Act appropriated federal funds for the promotion of vocational education on the same terms. Other measures of similar type have followed in rapid succession, especially during the years of economic emergency. Finally, the whole scheme of unem-

ployment insurance and old-age annuities, which was established by Congress in 1935, rests on the principle of giving federal aid to the states for social welfare purposes.

MERITS OF THIS PRACTICE.

The argument for federal grants-in-aid is that the nation should be regarded as a unit, not merely as a group of states. There is a national interest in some matters which are legally within state jurisdiction — such as roads, education, public health, the relief of distress, unemployment insurance, and old-age pensions. The federal government should, therefore, assume a constructive leadership in such matters and induce all the states to do their full duty. And this, of course, can best be accomplished by giving them financial assistance. Likewise, it is recognized that there are various things which the states must be persuaded to do in unison if they are to be done at all. If only a few states established compulsory unemployment insurance, for example, they would be penalizing themselves through a higher cost of producing goods in competition with the remaining states. Where Congress, therefore, does not have the power to *compel* united action on the part of the states, it is attempting to persuade them by means of federal subsidies.

THE DANGERS INVOLVED.

But there are some dangers in this policy. Federal subsidies, in the long run, must assuredly involve some degree of federal supervision and control, for the authorities who contribute the money are in duty bound to see that it is properly spent. The continued extension of the grant-in-aid policy is bound, therefore, to whittle away some of the independence of action which the states have hitherto enjoyed within their own constitutional sphere of activity. While a considerable expansion of federal aid has doubtless been justified by the necessity of dealing with great and difficult problems on a national scale, no American citizen should blink the fact that this enlarged participation by the federal authorities in the work of the states is insidiously reducing the latter to a secondary place in the frame of government.

This may or may not be desirable — but we should at least know what we are doing while we are doing it. The division of the country into forty-eight states is not a mere geographical accident. It is not the product of some chance historical happenings. On the contrary, it is the exemplification of a sound political theory: namely, that in a country so vast and varied as the United States, there must be a balanced distribution of governmental functions, otherwise the whole edifice of administration will eventually be weakened by its sheer top-heaviness and lack of resiliency. North Dakota and Mississippi, Rhode Island and California are under the same flag, but does this mean that they should be forced to

have their widely varying problems handled in precisely the same way? The theory of federal centralization assumes a uniformity of American life which does not in fact exist. America's strength as a nation arises from diversity as well as from unity. *E pluribus unum* — but we are in some danger of forgetting the *pluribus*. Any centralized pressure that tends to force all the forty-eight commonwealths into a common mould is bound to impair their virility; and, in the long run, what weakens the states will weaken the nation.

A FINAL QUERY ON CONGRESSIONAL POWERS.

A final question suggests itself: are there some fields of jurisdiction which ought to be transferred to the federal government by constitutional amendment, so that the general welfare will no longer have to be pursued in roundabout ways, through subsidies and otherwise? Doubtless there are. There are many who believe that Congress ought to have jurisdiction over all commerce, whether within the individual states or among them. The open-and-shut differentiation between *interstate* and *intrastate* commerce is no longer a practicable one. On the other hand, the transfer to the federal government of authority over all commerce (including local industries, shops, and stores) would involve a gigantic centralization of functions in Washington. Congress, it has also been suggested, should have the power to make uniform rules concerning the chartering of business corporations. Unquestionably it should have the right to make uniform rules as to the granting of divorces in the United States, thus placing a curb upon what has become, in some states, a social scandal. It should have power to impose duties on exports. Some educators believe that Congress should have the right to prescribe a minimum of public education throughout the United States. Other reformers have proposed to federalize the care of the public health, the making of labor laws, and the protection of all national resources. If we were making a general revision of the federal Constitution today, it is altogether probable that some of these additional powers would be given to the national government.

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References on the government of the District of Columbia may be found at the close of Chapter XXXIII.

CHAPTER XXX

THE NATIONAL DEFENSE

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The power requisite for attaining it must be effectually confided to the federal councils. — *James Madison.*

Anyone who glances through the records of the convention which framed the federal Constitution will be amazed at the amount of discussion that was devoted there to the subject of war, including declarations of war, appropriations for the army and navy, the control of the state militia, and the machinery for bringing wars to a close. In the end, no fewer than nine specific grants of war power were given to Congress: namely, the power to declare war, to grant letters of marque and reprisal, to raise and support armies, to make rules concerning captures on land and water, to provide and maintain a navy, to make rules for the government of the land and naval forces, to provide for calling forth the militia to execute the laws of the nation, to provide for organizing, arming, and disciplining the militia, and to exercise exclusive legislation over places acquired for forts, magazines, arsenals, dockyards, and other needful buildings.

A LIVE SUBJECT AT THE GREAT CONVENTION.

Among the eighteen clauses of the Constitution which enumerate the powers of Congress, therefore, a very substantial proportion deal with the various branches of military and naval authority. This indicates, as James Madison declared, that security against foreign danger was regarded in 1787 as an "avowed and essential object" of the Union. And well it might be, for the experience of the states during the Revolutionary War had shown the dangers which resulted from the inability of the states to mobilize their full military strength. On more than one occasion the cause of independence seemed likely to be lost through the lack of a strong central authority. The makers of the Constitution were determined that, whatever else might happen, the new national government would find itself plentifully endowed with power to defend the country against outside foes and to suppress disorder within. So they gave Congress a number of far-reaching war powers.

POWERS RELATING TO THE CONDUCT OF WAR

According to the Constitution, Congress alone can declare war. But a formal declaration is not essential to the outbreak of hostilities. Such declarations are customary, but no rule of international law requires them. Declarations of war are not issued for the benefit of the adversary but for the information of neutrals, so that they may observe the rules of neutrality and keep out of the way. Not infrequently a declaration of war is issued after the hostilities have actually begun, as, for example, after the attack on Pearl Harbor in 1941. When Congress does act, however, a declaration of war is usually embodied in a joint resolution which is then passed in both Houses and signed by the President. This resolution recites the reasons for the resort to arms and ends by declaring that a state of war exists.

1. THE POWER TO DECLARE WAR.

Congress has never yet declared war except on the recommendation of the President, but it undoubtedly has power to take such action on its own initiative and even to pass a declaration of war over the President's veto. On the other hand, while a formal declaration of war requires action by Congress, the President does not need to wait for such a declaration if a foreign power declares war upon the United States or commits an act of aggression. As commander in chief of the army and navy, moreover, he could deploy the armed forces of the United States in such a way as to make war inevitable. He could order the navy to seize the ships of another country or to bombard its ports. He could send an army across an international boundary without any specific authority from Congress, as President Wilson did in the case of Mexico. Prior to America's formal entry into the Second World War, the President ordered the navy to escort convoys of merchant ships to the British Isles and to protect such convoys against hostile acts by the Axis powers. In executing these orders, actual engagements were fought between American destroyers and German submarines. Thus, while the power to declare war is vested in Congress, the power to commit acts of war without a formal declaration rests in certain cases with the President.

THE PRESIDENT'S RELATION TO SUCH ACTION.

Letters of marque and reprisal are now things of the past. A century ago it was the custom of governments to grant such letters to private ships, authorizing them to prey upon enemy commerce. Such vessels were known as privateers and they played a lively part in the Civil War. This was especially true of various Southern privateers which wrought havoc upon Northern shipping. By the Declaration of Paris (1856) the

2. THE POWER TO GRANT LETTERS OF MARQUE AND REPRISAL.

various European countries agreed to abolish privateering, and, although the United States government has never formally adhered to this declaration, it has now accepted it in practice. No letters of marque were granted during the Spanish-American War or the two World Wars.

3. PRIZES AND CAPTURES IN WAR.

During a war the merchant ships of an enemy country are subject to capture. Such vessels are then brought into one of the captor's ports and a "prize court" determines what shall be done with them. Neutral vessels which assist the enemy by carrying contraband of war, such as arms or munitions, are also liable to capture. The United States has traditionally urged "the freedom of the seas," that is, the right of neutral ships to trade with belligerents without risk of capture and condemnation, but this right is not yet recognized by international law. During the thirties, Congress passed legislation which, among other things, provided that the belligerents in any war must pay cash for munitions purchased in this country and arrange for their transportation to the theatre of war in other than American vessels.

NEUTRALITY LEGISLATION AND LEND-LEASE.

This legislation constituted a tacit surrender of the traditional American position on the "freedom of the seas" for neutrals in wartime and was enacted to ensure that the United States would be able to maintain neutrality in the event of a war abroad. But the neutrality statute proved unpopular when war broke out in Europe since it prevented the giving of aid to those nations which were fighting the Axis coalition; and even before the United States entered the war in 1941, the Neutrality Act was circumvented by the adoption of a "lend-lease" arrangement under which the United States provided ships, munitions, and supplies on credit to Great Britain, Russia, and other Axis opponents, even supplying convoy protection for the transportation of these munitions and supplies to the war theatres. Then, when America formally entered the war, the provisions of the Neutrality Act no longer applied.

THE ARMED FORCES

1. THE POWER TO RAISE AND SUPPORT AN ARMY.

Although there has been much discussion about the advisability of uniting all the armed forces of the United States under a single department of national defense, the army and navy are still independent organizations, each administered by a separate department of the national government — the war department and the department of the navy. The Constitution conferred on Congress a broad grant of power to create and maintain the first of these establishments, there being no limit on its

authority to "raise and support armies," except that no appropriation of money for this purpose shall be made for a longer term than two years. This limitation means that Congress cannot commit the nation to any long-term program of military expenditures. In all other respects, whether as to the size of the army, the methods of recruiting it, or the measures necessary to sustain it, Congress has full power. This generous latitude was given because no one could foresee, in 1787, the dangers with which the Union might some day be confronted, although it was generally assumed by the makers of the Constitution that no large standing army would be required.

THE MILITARY FORCES IN THE INTER-BELLUM PERIOD.

Between the close of the First and the outbreak of the Second World War, the military forces of the United States included, first of all, the regular army. This consisted of approximately 150,000 men of all ranks. Second, there was the national guard or organized militia of the several states — a somewhat larger body. The latter is normally under the control of the states, but can be called into the federal service in time of emergency. In addition, there were the officers' reserve corps, the organized reserves, and the enlisted reserve corps. All of these various units were recruited by voluntary enlistment.

WARTIME SELECTIVE SERVICE.

In 1940, following the outbreak of war in Europe, Congress, for the second time in the present century, passed a Selective Service and Training Act to augment the personnel of the armed forces with a selective conscription of male citizens. The act of 1940, as amended after the actual entry of the United States into the Second World War, operated much like the act passed in 1917. A general registration of all males between the ages of eighteen and sixty-five was ordered. In the roster thus compiled, those between eighteen and forty-five were subsequently declared eligible for military service and were classified into various categories. Those of the first class (1A), embracing all physically qualified males without dependents and not engaged in essential industry, were made liable to immediate induction, while the other classes were granted deferments. As the war progressed, most physically fit males between the ages of eighteen and thirty-eight, including many with dependents,[1] were either called into service or enlisted before being called. Assigned at first exclusively to the army, the inducted men were also (after December, 1942) turned over to the navy, the marine corps, and the coast guard.

The administration of the selective service system was entrusted to a

[1] Provision was made by Congress for the payment of monthly allowances to such dependents.

director at Washington, assisted by a state director at each state capital. In every community were located one or more local boards made up of three persons appointed by the President on the recommendation of the governors in the states. These local boards determined, in the first instance, whether a registrant should be made available for immediate induction or placed in one of the deferred categories. But registrants were given a right to appeal from the decisions of these local boards to boards of appeal which were established in selective service districts. An official known as the "government agent," one of whom was assigned to each local board, could also appeal any registrant's classification. Each board of appeal consisted of five members, also appointed on recommendation of the governor. In certain designated instances a further appeal could be taken to the President, where it was determined, on his behalf, by a national board in Washington.

HOW IT IS ADMINISTERED.

As a result of the selective service system, the strength of the public forces was stepped up, month after month, until more than eleven million men had been placed in the armed forces, of whom more than eight million were in the army. A special army corps of women, popularly known as the W A C, with an authorized strength of 150,000, was recruited by voluntary enlistment to perform various clerical and other auxiliary duties, thus releasing for combat service many officers and enlisted men who otherwise would have had to perform this work. Thus evolved by far the largest army which the United States had ever raised and equipped.

SIZE OF THE WARTIME ARMY.

The strength of the permanent postwar army establishment is still conjectural. In view of the greater international responsibilities which the United States is likely to assume as a result of the war, it is highly improbable that the regular peacetime establishment will shrink to the prewar figure of 150,000. Nor is it likely that the army will entirely depend, as in the past, upon voluntary enlistment for its recruits. Large numbers of service men will doubtless be persuaded to remain in an army reserve, and this will provide the nucleus of a powerful force for some years to come. In addition, the idea of requiring every physically fit young man to undergo military training for a year or thereabouts, as a measure of permanent military preparedness, may eventually gain acceptance in the United States, as it did in the countries of Continental Europe many years ago.

THE FUTURE PEACETIME ARMY.

The President is the titular commander in chief of the army, but in virtually all administrative matters the secretary of war acts in his behalf. The principal army officer within the war department is the chief of staff. He is the adviser of the secretary of war on all technical matters

and is the official through whom the President exercises his powers as commander in chief, insofar as they relate to the actual operations of the army as a fighting machine. The chief of staff is the head of the war department's general staff, which is composed of a variable number of army officers representing all branches of the service, who are assigned to it for stated periods of time. The general staff has five divisions: namely, personnel, military intelligence, organization and training, supply, and operations. Each of these has an assistant chief of staff at its head. In a word, the general staff is the agency immediately responsible for the development of the army as a fighting force as well as for supplying the plans which are the basis of its activities and operations.

THE COMMANDER IN CHIEF AND THE GENERAL STAFF.

Since 1942 the army, as a fighting force, has been divided into three great commands, air forces, ground forces, and service forces, each with its own commanding general. Under this plan of organization, the army air force, which had so phenomenal a growth during the Second World War, is given a semiautonomous status, while both ground and air combat forces have been relieved of direct responsibility for procurement and supply. Necessary coordination comes through the activities of staff officers under the chief of staff and, in combat theatres, units of these separate commands may be brought together as needed under unified direction.

THE ARMY'S THREE COMMANDS.

Whatever the size and character of the future peacetime army, the state militia or national guard will undoubtedly continue to find a place in it. When the military provisions of the federal Constitution were being agreed upon, it was taken for granted that a well-regulated militia, rather than a standing army, would be the backbone of national defense. Accordingly, provision was made for keeping the militia of the states in existence and giving the federal government the right to use it in an emergency. The Constitution provides, however, that the state militia or national guard can be called into the service of the United States for three purposes only — to execute the laws of the Union, to suppress insurrection, and to repel invasion. None of these purposes contemplated the use of the militia on foreign soil. But Congress has found a way of circumventing this limitation, and of making the militia available for foreign service by the simple device of "federalizing" it when need arises. This was done by the Army Organization Act of June 4, 1920, in which Congress empowered the President to draft into the military service of the United States any or all members of the national guard whenever the use of the armed forces in excess of the regular army is authorized. Such action does not merely call the

2. THE MILITIA OR NATIONAL GUARD.

national guard units into the service of the United States, as the framers of the Constitution had in mind, but transforms the individual members of the state militia into federal troops who can be sent anywhere. Such federalization of the national guard took place on the approach of the Second World War.

During periods when the state militia is not in the service of the United States, there is a division of control. Congress has power to regulate the "organizing, arming, and disciplining" of the militia; but "the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress" are matters which the Constitution expressly reserves to the states. The reason for this divided control, which does not make for efficiency, is to be found in the public sentiment of the country when the Constitution was framed. The states were then very jealous of their military privileges and would not have tolerated the complete supremacy of the new national government over all the armed forces of the country. On the other hand, it was obvious that, if each state was left entirely to itself in the matter of organizing, arming, and drilling its militia, the country would never be able, in time of emergency, to call forth a homogeneous army. Accordingly, the national government was given such authority as would suffice to secure the essential uniformity in the militia systems of the several states, while the states themselves were allowed to keep the reins of direct control, including the appointment of all militia officers. This latter right was the one upon which the states laid the greatest emphasis.

STATE AND FEDERAL CONTROL OF THE MILITIA IN PEACE-TIME.

Power to "provide and maintain a navy" is also given to Congress, in this case without any restriction as to the period for which appropriations may be made. The navy, in the broadest sense of the term, consists of battleships, cruisers, destroyers, airplane carriers and aircraft, submarines, escort vessels, torpedo boats and landing craft, together with auxiliary vessels, such as transports, supply and repair ships, navy yards, hospitals, naval bases, airports, and the entire personnel connected with all of these. The naval authority of Congress includes the right to make rules for the general administration of the navy in all its branches, whether afloat or ashore. The President enjoys the same titular status as commander in chief of the navy as he does in the case of the military forces.

3. THE NAVY.

The marine corps has always been within the general jurisdiction of the navy department but enjoys a special status with its own commandant, who is charged with responsibility for the procurement, training, discipline, and distribution of the officers and enlisted personnel of

the corps. It is, as everyone knows, an amphibious force, established by act of Congress in 1798, which has since written many a glorious page in American history. In time of war, moreover, the United States coast guard, normally under the jurisdiction of the treasury department, becomes an integral part of the naval establishment, its personnel and equipment being used in naval operations. Like the army and the navy, both the marine corps and the coast guard enrolled large contingents of women who performed during the war various clerical and other duties, thus relieving enlisted men for combat service.[1]

THE MARINE CORPS AND THE COAST GUARD.

By the Washington Naval Limitation Agreement of 1921–1922, the United States secured naval parity with Great Britain, which until that time had ranked as the world's leading maritime power. The agreement also limited Japan, France, and Italy to a fixed percentage of the strength of the American or British navy in certain types of capital ships. This agreement expired in 1936 by reason of Japan's unwillingness to continue it, and unrestricted naval construction again became the rule. American naval expansion was not greatly accelerated, however, until the outbreak of the European war in 1939. Then the nation, confronted with the possibility of a simultaneous struggle on two oceans, began the upbuilding of what has turned out to be the most powerful naval force in history. Today the United States has gained an acknowledged primacy both in naval tonnage and in fire power. The nation now possesses a navy of such proportions that it includes not one but several fleets. Expansion has taken place in all types of craft, from the battleship down to the lowly, but highly important, landing ship. The most significant growth, however, has been in the number of airplane carriers and in the great flocks of naval aircraft which they shelter. When Japan surrendered the United States navy was said to have had more than fourteen thousand vessels of all kinds, with a gross tonnage of almost five million and more than twenty thousand planes to protect this giant flotilla. Postwar plans, already in effect, call for the retention of a sizable percentage of this total tonnage.

RECENT NAVAL DEVELOPMENT.

During the war with the Axis powers, moreover, the United States obtained possession of numerous new bases which can be used by naval vessels and aircraft. Best known among these acquisitions are the bases located in Newfoundland, Bermuda, and the

NEW NAVAL BASES.

[1] In the navy they were popularly known as the W A V E S (Women Accepted for Volunteer Emergency Service) and in the coast guard as S P A R S (from the coast guard motto "*Semper Paratus*" — Always Ready). The Marine Corps Women's Reserve did not get a nickname.

Caribbean, which were acquired under a long lease from Great Britain in 1940 as a trade for fifty over-age American destroyers. Naval installations have also been developed in the far Pacific — on the insular territories of the United States or in areas conquered, or reconquered, from Japan. Bases of great strength have been constructed at Guam, Saipan, and at other spots thousands of miles from America's west coast. The westward outpost of American naval power, which before the war was at Pearl Harbor, is likely to be located in future years much nearer the Orient.

FEDERAL CONTROL OVER MILITARY AND NAVAL INSTALLATIONS.

To supply facilities for the army and navy, the national government has acquired land within the United States on which to locate its navy yards, forts, arsenals, landing fields, training centers, hospitals, and other necessary installations. Over such property the Constitution provides that Congress may "exercise exclusive legislation"; in other words, Congress alone has power to make laws relating to such areas. The military and naval establishments of the United States are not subject to taxation by the states in which they happen to be located, nor may the states apply to them any restrictions inconsistent with a proper fulfillment of the purposes for which they are constructed. To all intents they are federal territory within the state boundaries. On the other hand, the Constitution stipulates that no property may be acquired by the national government in any state for military or naval purposes without the consent of the state legislature. This consent, however, the states have usually been willing to give.

SCOPE OF THE POWER TO CREATE AND MAINTAIN ARMED FORCES.

The makers of the Constitution could not have anticipated in 1787 what is nowadays designated as "total war"; but they were foresighted enough to endow the national government with ample authority to wage any kind of warfare. The power to "raise and support armies" and "to provide and maintain a navy" gives to Congress an almost unlimited authority over everything that is needed to effect a total mobilization of the nation's strength in wartime. When the armed forces are being trained for combat or are engaged in operations against a foreign enemy, every branch of agriculture, industry, or commerce, even the home life and habits of the people, may be regulated and placed under any necessary restraint in order to facilitate the "support" of such forces. It was by virtue of the authority to raise and support armies that Congress, in 1917, empowered the President to establish food and fuel administrations for the control of those essential commodities. The taking-over of the railroads, the telegraph and the telephone lines during the First World

War likewise came within the scope of these war powers. During the Second World War this same authority became the basis of the wartime legislation under which the President, by executive order, set up various administrative agencies to fix prices, establish military priorities on much of the nation's production, ration civilian goods and services, "freeze" workers in their jobs, and do whatever else was needed to supply the armed forces with the sinews of war.

VAST SCOPE OF THE WAR POWER.

When war comes, it overshadows all else. So long as the nation is at war, there appears to be very little, if anything, in the way of construction, conservation, or regulation, that Congress cannot control. The last ounce of national energy may be needed to support the armed forces; if so, Congress may call for it. Business may be regulated, taxes multiplied, wealth may be conscripted as well as men, and freedom of speech restrained. This is as it should be. Modern wars are not fought by armies but by nations. People ought to understand that such wars are bound to entail extreme civilian hardships and sacrifices. One need only look at the fate of Poland and Greece during the years 1939–1945, for example, to see what *vae victis* means.

THE TREATMENT OF THE VETERAN

WAR PROSPERITY.

War always creates an artificial prosperity because of the demand which it makes for all kinds of goods and services, particularly those directly related to the actual conduct of the war. This, in turn, stimulates employment to a high level. During the First World War some of the profits made by various forms of industry were so excessive, despite the imposition of an excess profits tax, as to occasion considerable criticism. Wages likewise rose to high levels during the years 1917–1919. Heeding the lesson of those years, the national government, during the Second World War, attempted to hold business profits to a reasonable rate, not only by levying a stiff excess profits tax but by limiting war contractors to a fixed and reasonable return above the cost of goods or services supplied. Attempts were also made to fix wage levels and to permit increases only when it was statistically demonstrated that there had been a rise in the cost of living. Nevertheless, despite these controls, many classes of the civilian population experienced an unwonted prosperity, the enjoyment of which was not seriously dimmed by the widespread rationing of commodities, by increased taxes on personal incomes, or by the government's endeavor to drain off surplus cash by the high-pressure selling of war stamps and war bonds.

In this surge of civilian prosperity the men who were called into the armed services had no share. Their pay did not rise with the cost of living. During the First World War the initial pay of a drafted man was thirty dollars a month together with subsistence. During the Second World War it was fifty dollars per month, with subsistence and with stated monthly allowances for dependents. At these rates the disparity between the earnings of drafted men and deferred civilian workers was very great. The returned soldier in 1919–1920 found that, while he was serving in France for thirty dollars a month, most of his friends had been getting thirty dollars a week. Resenting this disparity, the veterans of World War I secured the enactment of a law for "adjusted compensation." This stipulated that all ex-servicemen (irrespective of disability) should receive non-interest-bearing certificates entitling them, or their heirs, to cash payments in 1945, the amount in each case depending upon length of service. In 1931, Congress made a further concession by providing that holders of these certificates might borrow up to half their face value. This, however, did not satisfy the veterans' organizations which presently returned with a demand that the certificates be redeemed at once and in full. Their pressure at Washington achieved its objective and, in 1936, Congress gave way by providing that the adjusted compensation certificates might be at once converted into government bonds which in turn could readily be sold for cash.

THE ATTITUDE OF THE SERVICEMAN.

There can be little doubt that claims for adjusted compensation will similarly be made during the years which follow the close of the Second World War. Congress, however, has already made certain provisions which are intended to satisfy some of the veterans' legitimate claims. Most noteworthy among these are the arrangements set up in the Servicemen's Readjustment Act of 1944, popularly known as the "G I bill of rights." Besides increasing hospitalization and other facilities for the care of veterans, this act makes provision for finding them jobs, and if suitable jobs are not found it grants them unemployment compensation at a weekly rate for as long as a year. Likewise, it offers a government guarantee, to any bank loan, up to a stipulated amount, which any honorably discharged serviceman may secure for the building of a home or the purchase of a business. Finally, it provides arrangements whereby ex-servicemen may go to school or college at government expense for a designated term. Generous provisions have also been made by Congress for the care of disabled veterans, as well as for pensions for

PROVISION FOR VETERANS OF WORLD WAR II.

THE G I BILL OF RIGHTS.

veterans' survivors.[1] Taken together, these measures represent a degree of consideration for the welfare of servicemen not manifested after any previous conflict in which the United States has been engaged. Whether they will greatly mitigate the pressure for large cash payments in the way of a bonus is at least doubtful. The cost of a war continues even after the last man who fought in it has had "taps" sounded over his grave. For the young widow of an aged veteran asks for, and usually gets, a prolongation of the nation's generosity. It is only a few years since Uncle Sam paid the last pension arising out of the War of 1812. Today, eighty years after Lee's surrender, the government is still paying pensions, thousands of them, chargeable to the Civil War. One may safely predict, therefore, that no one now living will ever see the cost of the Second World War finally liquidated.

TYPES OF MILITARY JURISDICTION

Along with its numerous other powers over the land and naval forces of the nation, Congress has been vested with the authority to make rules for their government. The general rules for the government of the land forces are contained in the Articles of War, while the navy is governed by a general code of regulations. These two codes of rules, enacted by Congress for the government of the land and naval forces, make up a branch of jurisprudence which is commonly known as military law. Its enforcement is confided to courts-martial.

1. MILITARY LAW.

Military law applies only to persons who are in the military or naval service and should be clearly distinguished from *martial* law, which is a term used to designate the government of any region or district in which the ordinary civil administration is superseded temporarily by the military authorities. When martial law is proclaimed, the ordinary laws and courts are no longer paramount; the military authorities prescribe the rules and administer them for the time being. Martial law applies to the civilian inhabitants of the area in which it is proclaimed. It may, but does not necessarily, include within its scope the members of the armed forces.

2. MARTIAL LAW.

Martial law may be proclaimed at any time by Congress, or by the President, if such action is urgently required before Congress itself can authorize it. But martial law is never put into force except in case of invasion, grave internal disorder, civil or foreign war, and then only in districts where the ordinary

WHAT MARTIAL LAW MEANS.

[1] In both World Wars provision was made for a plan of war risk insurance by which all servicemen might acquire a policy of life insurance, not exceeding $10,000, at very low rates. In both wars, moreover, arrangements were made for the vocational training of partially disabled veterans as well as for monthly allowances to the totally disabled.

law is unable to secure the public safety. There are no prescribed rules of martial law. The orders of the officer commanding the military forces, when duly promulgated, are to be obeyed and their violations may be summarily punished by the military authorities. In other words, martial law is not a statutory code but is made up of the day-to-day regulations which are rendered necessary by the exigencies of military control. Special military tribunals, which should be distinguished from courts-martial, are established to administer martial law if necessary; but occasionally the existing courts are retained. Martial law was administered on an extensive scale over large sections of territory during the Civil War.

While the establishment of martial law in any area deprives the inhabitants of their ordinary civil law and civil courts, it does not of itself withdraw from them the constitutional rights of citizens.[1] Military, as well as civil, officials are bound by the Constitution, and the substitution of martial law for ordinary law does not change the relation between the individual and his government so far as his constitutional guarantees are concerned. The privilege of the writ of habeas corpus is not suspended by the mere proclamation of martial law. As indicated in a subsequent chapter,[2] the privilege of the writ enables anyone held in custody to obtain a speedy hearing before a regular court; its suspension means that a prisoner may be held indefinitely without a hearing. The Constitution declares that the privilege of the writ may not be suspended except when, in case of rebellion or invasion, the public safety demands it; and although it is not clear whether the President or Congress may suspend it, there is no doubt that it cannot be suspended unless one or the other of these authorities issues a proclamation or other process specifically authorizing such action. The suspension does not occur as an incident of the proclamation of martial law. During the Civil War, when the privilege of the writ was suspended in certain localities by President Lincoln, the President's action was subsequently validated by an act of Congress.

LIMITATIONS ON MARTIAL LAW.

When territory is conquered and held by an invading force, it is usually given, for the time being, a military government. This, again, should be distinguished from the administration of martial law, for while the establishment of military government involves the superseding of the old sovereignty, it does not usually abrogate the existing legal system. The President, as commander in chief, has full power to set up this form of government in occupied territory. A military government, for example, was established by the

3. MILITARY GOVERNMENT.

[1] On this general subject see Charles Fairman, *The Law of Martial Rule* (2nd edition, Chicago, 1943).

[2] Chapter XXXIV.

United States in Puerto Rico after its conquest from Spain in 1898, and remained in charge of the island until 1900, when Congress made provision for a civil administration. Meanwhile, martial law was not proclaimed, nor was the old Spanish jurisprudence at once abrogated. A military government was also set up by the United States in the zone occupied by the American troops on the Rhine during the year following the armistice of 1918. Here also the local authorities were left in charge of routine civil functions, subject to supervision by the American military command. An even more extensive experience with this form of government was acquired during the Second World War in enemy territory conquered and occupied by troops of the United Nations. The United States trained a special body of "civilian affairs officers" of the army who, in conjunction with similar officers from the British and other armies of the United Nations, set up what was known as the Allied Military Government in Italy and Germany. Civil affairs officers were also trained by the navy for the military government of conquered Japanese territory in the Pacific.

Military law, martial law, and military government, accordingly, are three quite different things, although they are often confused. The first, which is effective during peace as well as during war, includes within its jurisdiction only members of the land and naval forces. The second replaces the ordinary civil law, either in peace or war, whenever the regular administration proves inadequate to maintain the public safety. It applies to all the inhabitants of the area in which it is proclaimed. The third, military government, is a form of rule temporarily set up in conquered or occupied territory.

CIVIL LIBERTIES IN WARTIME

Inter arma silent leges. It is an ancient maxim that under stress of armed conflict the laws and the rights of the citizens give way. In the United States this maxim does not apply; the constitutional rights of the citizen remain intact and the ordinary laws of the land continue to operate in wartime. Nevertheless it is true that a state of war requires unusual vigilance on the part of the government and this may lead it to lay various restrictions upon individual freedom which would not be imposed in time of peace. During the First World War, for example, Congress passed the Espionage (1917) and the Sedition (1918) Acts, which provided penalties for making or circulating false statements with intent to injure the United States, or for using "disloyal, profane, scurrilous or abusive language" about the form of government,

WAR AND THE BILL OF RIGHTS.

THE ESPIONAGE AND SEDITION ACTS.

the Constitution, the flag, or the armed forces. Although this legislation was regarded as an unwarranted interference with freedom of speech in some quarters,[1] it was subsequently upheld by the courts.[2]

SECURITY MEASURES IN WORLD WAR II.

Just prior to America's involvement in the Second World War, this earlier legislation was supplemented by other acts to provide for the more effective security of the United States. These included an act requiring foreign agents to register with the state department, an act for registering aliens, and the Voorhis Act to control subversive organizations. But probably the most far-reaching and, in a constitutional sense, the most debatable of all security measures ever taken by the government of the United States occurred in the months immediately following the attack on Pearl Harbor when all Japanese aliens and American citizens of Japanese ancestry were removed from many west coast areas to camps and settlements which the government had provided further inland. The move, ordered by the President and carried out by the army, was defended as a protective measure necessary to the security of the United States in the war which it was waging with Japan.

DIFFICULTY OF RECONCILING SECURITY AND LIBERTY IN WARTIME.

Everybody agrees that people ought to have reasonable liberty to express their own thoughts in their own way and to be protected in their elementary liberties even in wartime. On the other hand, it is just as fully agreed that the government has a duty to protect itself, and that such duty becomes particularly urgent in wartime. At such a time it is necessary for the public authorities to be particularly vigilant in combating treason and other activities which are deliberately calculated to impede the military effort or otherwise aid the enemy. In fulfilling this duty, even a democratic government, which is accountable to the people and the law, and which is presumed to be especially considerate of civil liberties, may be guilty of an excess of zeal and take protective measures not clearly required for the public safety. Moreover, war inflames popular passions and may impel a government, most of all a popular government, to do unwise things. An excited nation, like an excited man, is entitled to some allowance for the stress of circumstances. We ought not to judge the liberties of the citizens by what happens during a war.

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[1] Zechariah Chafee, Jr., *Freedom of Speech* (New York, 1920).

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CHAPTER XXXI

AMERICAN FOREIGN RELATIONS

This mighty and free Republic should ever deal with all other States, great or small, on a basis of high honor, respecting their rights as jealously as it safeguards its own. — *Theodore Roosevelt.*

The great, and potentially greater, importance of America's foreign relations was well understood by those who established the Union. One of the first acts of the Continental Congress, following the adoption of the Declaration of Independence, was to enter into an alliance with France for mutual assistance, the only full-fledged formal alliance which the United States has ever concluded with a foreign power. The naval and other assistance, given by France under the terms of this alliance, contributed materially to the success of the Revolutionary cause. Those who drafted the Constitution, moreover, were mindful of the fact that the very act of setting up a "more perfect union" would enhance American diplomatic prestige and gain for the newly united nation a greater respect among the chancellories of the world; and the provisions which they placed in this document for the effective conduct of foreign relations occasioned no serious disagreement among the delegates to the great convention. Nor is it without significance in this connection that the very first administrative department to be created by Congress, after the inauguration of the new government, was that of foreign affairs (later changed to the department of state), followed almost immediately by the creation of the department of war.

THE ATTITUDE OF THE FOUNDERS.

THE CONDUCT OF FOREIGN RELATIONS

Experience in dealing with foreign powers during the Revolutionary War and in the years immediately following it convinced the makers of the Constitution that America should be able to speak to foreign nations with a single voice. Hence they gave that responsibility to the federal government and made certain that no individual state of the Union would be able to exert any sort of veto on the foreign policy of the nation or render

FEDERAL MONOPOLY OVER FOREIGN RELATIONS.

the conduct of foreign relations unduly difficult. To this end they expressly forbade a state without congressional consent to enter into any treaty or alliance, to impose duties, to "keep troops or ships of war in time of peace," or to engage in war except when actually invaded or seriously threatened with invasion. They stipulated, moreover, that the subject matter of such treaties as the United States might make with foreign states should not be limited by the reserved powers of the states. This they did by expressly providing that "all treaties made, or which shall be made, under the authority of the United States" should rank with the Constitution itself as the supreme law of the land, with primacy over "anything in the constitution or laws of any state." [1]

PRIMARY POSITION OF THE PRESIDENT.

But the treaty-making power thus given to the national government is, of course, not vested in any one branch of it. The President has the sole initiative in this field. No treaty starts on its way without his approval of it. The Senate takes the next step. Its influence over treaty-making, because of the constitutional requirement that every treaty be submitted to it for concurrence by a two-thirds majority, has already been commented upon.[2] Congress as a whole, moreover, because of its power to legislate upon the international aspects of commerce and other subjects, and especially because of its control of the purse strings, exerts a powerful check upon the commitments which the government may make to other nations. In general, nevertheless, those who speak for the United States in its relations with other countries and who guide its foreign policies are the President and his advisers, most important among the latter being the secretary of state.

Anyone who studies the history of American foreign relations during the past hundred and fifty years will be convinced that the chief executive has been able to put the stamp of his leadership on the great majority of the nation's actions in this field. It is true, of course, that on some notable occasions the Senate has rebuffed this leadership, and has rejected a treaty submitted to it by the President — an outstanding example being its refusal to ratify the covenant of the League of Nations after the First World War.[3] But these occasional setbacks should not be permitted to obscure the fact that the conduct of foreign relations has been, as it was intended to be, a presidential and not a congressional function.

The principal reason for this primacy of the President in foreign affairs

[1] Art. VI, Section 2.

[2] See pp. 290–293.

[3] Earlier examples were the Senate's refusal to follow President Pierce's leadership in his desire to acquire Cuba, or Grant's in the attempt to annex Santo Domingo, or Cleveland's in the case of Hawaii.

is his control over the channels of diplomacy. The Constitution provides that he shall appoint ambassadors and other members of the foreign service and that he shall receive the diplomatic representatives of foreign nations. As Alexander Hamilton pointed out long ago, this inevitably makes the President the official spokesman for the United States in all diplomatic matters. Communications with foreign powers must go through him or through channels which he controls; and only through these same channels can foreign nations officially communicate with the United States. Hence, the President can, and often has, used this control over the channels of diplomatic intercourse to deny recognition to a foreign government. All that is necessary in such cases is a refusal to receive its diplomatic representative and at the same time refrain from sending an American diplomatic representative to its capital.

REASONS FOR PRESIDENTIAL SUPREMACY IN THE FOREIGN FIELD:

1. CONTROL OF THE CHANNELS OF DIPLOMACY.

Someone may raise the point that the President's control over the channels of international intercourse is limited by the fact that when he appoints ambassadors or other diplomatic officials, such appointments must be approved by a majority vote of the Senate before they become effective. But there are two reasons why this senatorial limitation does not, in actuality, amount to very much. In the first place, the Senate very rarely, almost never in fact, refuses to confirm anyone nominated by the President for a diplomatic post. In the second place, the President, in carrying on diplomatic negotiations, is not limited to the regular officials who have been approved by the Senate. He can send as his representatives to foreign governments any number of personal emissaries or agents who have no official diplomatic status at all and, hence, do not need senatorial confirmation. But, being the President's personal representatives bearing credentials from him, they are informally received by the foreign governments to which they are sent, and often carry on negotiations of high importance. During recent years an increasing use has been made of these personal emissaries because of a feeling that they can accomplish more, in some cases, by informal contact than would be possible through the rather highly formalized procedure of the regular diplomatic channels.

NO REAL LIMITATIONS ON IT.

Another source of the President's great and growing influence in the foreign affairs of the nation can be found in his authority to negotiate executive agreements. Although a regular treaty always faces the possibility that it will be rejected or mutilated by the Senate, there is no such danger in the case of what is known as an "executive agreement." What is the difference

2. POWER TO NEGOTIATE EXECUTIVE AGREEMENTS.

between the two? No hard and fast line of demarcation can be drawn.[1] But, in general (although not always), an executive agreement deals with matters which are not regarded as of sufficient importance to warrant their incorporation in a formal treaty — for example, the settlement of monetary damages claimed by American citizens from foreign governments. Nevertheless, these agreements do sometimes deal with matters of prime importance and occasionally have been used to circumvent the necessity of obtaining the Senate's approval. In 1905, as an illustration, President Theodore Roosevelt submitted to the Senate a treaty with Santo Domingo which guaranteed the territorial integrity of that Caribbean republic and provided for the approximate equivalent of an American protectorate. The Senate refused its assent, whereupon the President managed to gain his ends, for a time at least, through an executive agreement.

The power to make executive agreements may arise out of some specific constitutional prerogative of the President, such as his command of the armed forces; or it may result from some general authority conferred by Congress, as in the case of the reciprocal trade agreements. In either case, an executive agreement between the United States and another country requires for its validity no approval at the hands of either the Senate or the House. Its content is at the discretion of the President, provided, of course, that the agreement contains nothing contrary to the Constitution or laws of the United States. When a treaty and a federal law conflict, the one which is later in point of time prevails, for both are on the same level. Does an executive agreement have the same status? There seems to be some reason for believing that it does, although the Supreme Court has not yet declared itself definitely on this point.[2]

The increasing frequency with which executive agreements are being used in place of treaties is significant. It indicates the steadily growing intimacy of contact between the United States and other countries. This international intercourse has become so continuous, and covers so many matters, that the slow and cumbrous procedure involved in the ratification of formal treaties is regarded in many quarters as a hindrance to the efficient conduct of foreign relations. Other countries have a simpler and more expeditious procedure. But the increasing use of executive agree-

[1] Wallace M. McClure, *International Executive Agreements: Democratic Procedure under the Constitution of the United States* (New York, 1941).

[2] The issue is rather too complicated for discussion here. Those who desire to explore it may be referred to E. S. Corwin, *The Constitution and World Organization* (Princeton, 1944), pp. 42*ff.* and his discussion of the Supreme Court's decision in United States *v.* Belmont, 301 U. S. 324 (1937). The decision in this case held that an executive agreement, properly made, took primacy over a conflicting state law; but the Court was not called upon to pass on the question whether an executive agreement, like a treaty, is on a parity with a federal law.

ments is also, no doubt, an indication of the impatience with which the administrative authorities look upon the Senate's part in treaty making. It is part of the desire for greater freedom from legislative restraint which the executive branch of the government has been apparently displaying in recent years.

A third reason for the President's influence in the field of international relations may be found in his direct control of the military and naval forces. As commander in chief of the army and navy, he can, even in peacetime, dispose of these forces in such a way as to give maximum support to policies which he favors. He may even order these forces to invade foreign territory, as President Wilson did in Mexico (1913), as a means of protecting American public or private rights. It is quite conceivable that he might go so far in this way as to make war with a foreign state virtually inevitable. The only checks on his discretion are public opinion and such isolated legal obstacles as Congress may impose.

3. HIS CONTROL OF THE ARMED FORCES.

Does the American scheme of government, with its separation of powers, place the United States at a great disadvantage in dealing with such countries as Great Britain and Russia, which allow their chief executives a much freer hand in making international commitments? There can be no doubt that, in some contingencies, the American handicap is considerable. There are diplomatic situations which will not wait for their solution until the Senate can debate and vote upon it. Yet, under the present constitutional arrangements, there is no way in which Senate action can be avoided if the solution involves a treaty. On the other hand, it has been demonstrated on more than one occasion that if the President keeps in close touch with the leaders of the Senate during the diplomatic negotiations and gains their tacit approval step by step, he can be reasonably certain that when his treaty is concluded it will not be nullified by the Senate's refusal to go along with him.[1]

A DIPLOMATIC HANDICAP?

AMERICAN FOREIGN POLICY — THE EARLIEST PHASE

The United States, like other members of the family of nations, is subject to the rules of international law. The term "international law" is somewhat misleading because it is not law in the usual sense, that is, it does not have a definite source or a definite sanction. It is merely a body of rules and practices which nations are accustomed to follow in their dealings with one another. For the most part, it is made up of usages and

THE UNITED STATES BOUND BY INTERNATIONAL LAW.

[1] A striking illustration was afforded in the case of the United Nations charter during 1945.

precedents, some of them very old. Since there is no supernational authority to enforce international law, its observance depends upon the willingness of states to be bound by it. Some of its rules, however, are enforced (when the occasion arises) by the regular courts of individual countries, and in the Constitution of the United States the federal courts are given power to deal with "offenses against the law of nations."

But the rules of international law are applicable to only a small part of what is included within the totality of international intercourse. The greater part is not a matter of law but of policy. Every country is assumed to have a foreign policy. In the case of the United States, foreign policies may be implicit in various actions taken by the government towards other nations or they may be formally expressed in the President's messages to Congress, or in his public addresses, or in congressional resolutions, treaties, or even in informal communications to other governments. In general, American foreign policies, like those of all sovereign states, have been determined by the facts of geography, by considerations of national interest, and to a considerable extent by certain deep-rooted ideals and traditions.

THE DETERMINANTS OF FOREIGN POLICY.

Isolated by geographical location and relatively self-sufficient, the American people have shown, on the whole, less interest in foreign policy and in the conduct of foreign relations than have the people of European nations. Nevertheless, such matters have been of major concern to almost every presidential administration since Washington's day and have exerted a profound influence upon the nation's growth. This was particularly true of the three decades after the adoption of the Constitution, when no administration dared, for long, to give less concern to foreign than to domestic affairs. The dominant policy of that period was one of neutrality and noninvolvement in European affairs. This policy, however, did not altogether succeed in isolating America from the military struggles of the great European powers. In 1798, the United States became embroiled in an undeclared naval war with France. In 1812, after fruitless efforts to keep out of the Napoleonic wars by means of embargoes and non-intercourse acts, the nation was drawn into a war with Great Britain. On the other hand, it was by taking advantage of Europe's vicissitudes that the United States secured the imperial domains of Louisiana from France in 1803 and acquired Florida from Spain in 1819.

ITS VARIOUS STAGES.

HEMISPHERIC SECURITY — THE MONROE DOCTRINE

After the formative years of the republic, interest in foreign affairs, though by no means negligible, declined considerably. For nearly three quarters of a century after 1825 public interest was centered mostly upon internal politics and economic development. Throughout this period, however, there was one principle of foreign policy to which the United States adhered consistently. This was the principle of hemispheric security incorporated in the Monroe Doctrine. Largely the work of John Quincy Adams, this doctrine was enunciated by President James Monroe in a message to Congress (1823) at a time when it appeared that the so-termed Holy Alliance, made up of certain European monarchies, might intervene to force the newly independent republics of Latin America back under the suzerainty of Spain. The gist of the doctrine was that while the United States intended to respect existing possessions of European powers in the Western Hemisphere, any attempt on their part to extend their political systems in the New World would be considered dangerous to the peace and safety of the United States and a "manifestation of an unfriendly disposition" towards this country.

ORIGIN OF THE MONROE DOCTRINE.

Had it not been for the sympathetic support of Great Britain, the United States might not have been successful in compelling observance of this doctrine when it was first announced. But having once enunciated it, the government of the United States has never hesitated to apply the doctrine on its own responsibility and has been uniformly successful in securing the compliance of non-American powers with its main provisions. In 1867, for example, the doctrine was invoked to back up a demand that the French troops who were supporting the imperial regime of Maximilian in Mexico be withdrawn. In 1895, President Cleveland made it the basis of a demand that Great Britain arbitrate with Venezuela a question which had arisen concerning the boundary between that country and British Guiana. It was during this controversy that Richard Olney, secretary of state in President Cleveland's cabinet, made the frank avowal that the United States had become "practically sovereign" in the Western Hemisphere. Still another manifestation of what the Monroe Doctrine implies occurred in 1913 when a resolution adopted by the United States Senate warned Japan not to carry out a rumored scheme to colonize a strip of Mexican territory around Magdalena Bay in Lower California. Noteworthy is the fact that in 1919, at the insistence of the

ITS APPLICATION DURING THE NINETEENTH CENTURY AND LATER.

United States, the doctrine was given recognition as a "regional understanding" in the covenant of the League of Nations.

The self-imposed responsibilities of the United States under the Monroe Doctrine underwent some enlargement in the early years of the twentieth century, because it became obvious that European countries could not logically be denied the right to intervene on behalf of their own nationals in certain Caribbean areas, unless some assurance could be given that the United States would attempt to see justice done without such European intervention. It was argued, and with some force, that the Monroe Doctrine was not designed to let Latin-American states repudiate their debts or wrongfully confiscate foreign property at will. A case in point arose during 1904 when certain European countries, whose citizens had loaned money to Santo Domingo, threatened to seize its seaports and assume control over Dominican customs as a means of obtaining the interest which had been promised by Santo Domingo on these loans. President Theodore Roosevelt took measures to forestall such seizure by dispatching naval forces to the island republic and making an executive agreement with the Dominican authorities, which provided for American supervision of the local customs and the allocation of part of the proceeds to the European creditors. This pattern, established as a Roosevelt corollary to the Monroe Doctrine, was later extended in the Caribbean area. During the next quarter of a century, United States marines were placed on temporary duty in Haiti and Nicaragua, and for a time it seemed as though the United States was gradually assuming the joint role of an international policeman and bailiff in these southern areas.

THE "ROOSEVELT COROLLARY" OF THE DOCTRINE.

Needless to say, this self-imposed role was not highly popular in the republics of Latin America, which were inclined to regard it as a step towards making the United States "practically sovereign," in fact as well as in theory, throughout the Western World. Nor, on the other hand, was the practice of sending armed forces into Latin-American countries popular with the people of the United States. There was a fear that such action might lead to permanent intervention.

LATIN-AMERICAN REACTIONS TO THE MONROE DOCTRINE.

On both sides of the Rio Grande, therefore, there was some feeling of relief when President F. D. Roosevelt announced, during his first administration, a definite change of policy. American marines stationed in certain Caribbean outposts were withdrawn and assurance given that the United States would hereafter refrain from armed intervention in time of peace. As an

ADVENT OF THE "GOOD NEIGHBOR" POLICY.

earnest of the changed orientation, the Platt amendment, which had been added to the Cuban constitution of 1901 at American insistence, was repealed. This amendment gave the United States a right to intervene in the internal affairs of Cuba whenever the Washington authorities deemed such intervention necessary for the maintenance of "independence, order and republican government," as well as to see that Cuba discharged her obligations to other nations. In keeping with this new spirit, an announcement was made that hereafter the United States would consult with other American republics in determining what steps might be taken jointly to maintain order in any of them. This "good neighbor" policy has been implemented by various Pan-American conferences during the past dozen years, the latest being held at Mexico City in 1945. Among other agreements made at this conference, which was attended by representatives of the United States and all the Latin-American countries except Argentina,[1] it was agreed that the territorial integrity of all the southern republics should be jointly guaranteed for the duration of the war, with the hope that a similar and permanent guarantee might be established thereafter.

AMERICA AS A WORLD POWER

Most Americans, during the nineteenth century, did not realize how inexorably their country was rising to the rank of a great world power. But, as this century drew to its close, this realization began to spread; and American foreign policy commenced to move beyond the confines of hemispheric insularity. In this heyday of European imperialism, the great powers across the Atlantic were carving colonial dominions out of Africa and delineating spheres of influence in Asia. Leaders of American opinion were not uninfluenced by this scramble for raw materials and markets, which was inspired by a belief that "trade follows the flag." They pointed out that the old American frontier had vanished and that the nation had now become a producer of agricultural products and manufactured goods beyond the needs of its own people. Hence, there was a growing need for outlets for export. America, they argued, had come of age and should take her place among the world powers.

REBIRTH OF INTEREST IN WORLD AFFAIRS.

So things began to move in that direction. As early as 1889, the United States, in somewhat casual fashion, assumed its first extra-hemispheric

[1] Argentina subsequently accepted the agreement, commonly known as the Act of Chapultepec, and was invited to the United Nations Conference on International Organization at San Francisco.

territorial responsibility by agreeing to share with Germany and Great Britain in a tri-power protectorate over the Samoan archipelago in the Pacific. A few years later this ripened into the extension of American sovereignty over a part of these islands. In 1894, the leaders of a revolutionary government in Hawaii asked for annexation of these islands to the United States. Although this request was at first declined, it received favorable consideration by Congress four years later, and Hawaii became a part of the United States.

FIRST SIGNS OF EXTRA-HEMISPHERIC TERRITORIAL INTERESTS.

But the event which marked America's definite entry into the arena of world politics was the Spanish-American War. By the treaty which closed this short conflict, the United States was left in possession of Puerto Rico, Guam, and the Philippines. The decision to hold the Philippines as an insular possession carried the responsibilities of the United States all the way across the Pacific. A few years later, President Theodore Roosevelt demonstrated his country's new interest in trans-Pacific affairs by becoming instrumental in bringing about the Peace of Portsmouth which closed the war between Japan and Russia in 1905. Even more significant was his sending of an American representative to a conference at Algeciras, which was called in 1906 to settle a serious dispute among the great powers of Europe concerning their rival interests in Morocco.

AMERICA BECOMES A WORLD POWER.

Meanwhile, American policy towards the affairs of the Orient was given clarification and a definite goal, when the principle of the "open door" in China was announced in 1899. The open door implied equality of access to Chinese markets for the nationals of all countries, including the United States, and the preservation of Chinese territorial integrity. Looking backward, one can now see that insistence on this policy was bound to clash with the plans of Japanese expansionists. It did, indeed, result in the enunciation of the so-called "Stimson doctrine" which, in 1931, stipulated that the United States would not recognize the legality of conquests made by Japan in Manchuria and elsewhere on the Chinese mainland. Resentment against this principle, which was rightly and rigidly upheld by the United States in negotiations with Japan during the autumn of 1941, led to the open breach between the two countries.

THE OPEN DOOR AND RELATIONS WITH JAPAN.

When the United States entered the First World War there was some fear that a resurgence of American imperialism would be one of the consequences. But the nation's war aims, as stated by President Wilson, frankly repudiated all desire for territorial acquisitions. As a means of prevent-

WILSON'S PROPOSALS FOR COLLECTIVE SECURITY THROUGH A LEAGUE OF NATIONS.

ing future wars, it was proposed that there should be a world union of states, large and small, mutually pledged to defend each other's territorial integrity, to settle disputes by pacific means, and to take common action, in the form of economic and even military sanctions, against aggressors. Included in this general plan of collective security was the idea of creating trusteeships, or mandates, which the great powers would hold in relation to those territories which had been wrested from the defeated countries — this in lieu of a division of these areas as spoils of war among the victors.

The general features of this plan were embodied as a Covenant of the League of Nations which became, in 1919, an integral part of the Treaty of Versailles. The refusal of the United States to ratify this treaty in its existing form ended hopes of American participation in the League. This action, moreover, became the initial step in a virtual retreat from the position of active influence in world politics which the United States had held during and immediately after the First World War. The drift in this direction was somewhat accelerated by American resentment over the inability or disinclination of European countries to repay the loans which the United States had extended to them during the war. Among considerable sections of the American people a feeling existed that the entry of the United States into the war had been induced by foreign propaganda, plus the machinations of international bankers and the makers of munitions, rather than by any real danger to the national security. In such an atmosphere the idea of national isolation became popular. Congress was urged to "insulate" the nation against any future European conflict, and, in response to these urgings, enacted the Johnson Act which prohibited loans to any government that was in arrears with respect to the payment of its indebtedness to the United States. Later, as the Second World War loomed on the European horizon, Congress went further by adopting legislation which forbade American citizens to travel in war zones, required belligerent countries to pay "cash on the barrelhead" for munitions purchased in the United States, and stipulated that they must arrange for the transportation of these goods in non-American vessels.

THE AMERICAN REACTION TO THE LEAGUE COVENANT.

TREND TO ISOLATION.

Meanwhile, this isolationist spirit reflected itself in relations with the Philippines. Responding to the urgings of political leaders there, Congress in 1934 passed the so-termed Philippine Independence Act which gave the islands a large degree of autonomy and promised full independence in 1946. Coupled with this was the assurance that the United States would endeavor to

THE REACTION AGAINST GLOBAL RESPONSIBILITIES.

negotiate an international agreement guaranteeing the territorial integrity and neutralization of the new Philippine Commonwealth. A further evidence of American disinclination to become burdened with global responsibilities was indicated when Congress declined to provide funds requested by the naval authorities for fortifying the island of Guam — this in the face of clear indications that Japan was strongly fortifying her mandated islands in the same region.

THE FUTILE HOPE OF NEUTRALITY IN 1938–1941.

This general isolationist spirit continued not only during the early months of the European war in 1939, but even as late as the autumn of 1940, after Germany had overwhelmed France, Norway, Denmark, Holland, and Belgium. Nevertheless, the government of the United States was openly giving aid to Great Britain and to the other countries which were opposing the German-Italian Axis, and it was clearly apparent (or ought to have been) that this action could only end in full participation by the United States in World War II. This belligerent status was then suddenly forced upon the United States by the Japanese surprise attack at Pearl Harbor on December 7, 1941. A declaration of war on Japan followed immediately and, within a few days, Germany joined Japan, her ally, in the war against America. In this new situation the isolationist spirit in the United States, at any rate what was left of it, quickly disappeared and the nation became solidly unified, both in temper and action, for the prosecution of a two-ocean war.

POSTWAR POLICY

During the years 1943–1945 diplomatic discussions among the Allies, now known as the United Nations, led to the formulation of general plans for a new world organization with the purpose of preventing aggression and preserving the peace. First outlined at a conference between President Roosevelt, Prime Minister Churchill of Great Britain, and Marshal Stalin of Russia, held in Teheran, Persia, this general plan followed to some extent the lines of the old League of Nations, but departed from the latter in a few significant features. For the elaboration of the details, a gathering of representatives from the United Nations met at Dumbarton Oaks (adjoining Washington) in 1944, followed by a larger and more formal conference at San Francisco in the spring of 1945. At this conference the representatives of nearly fifty nations unanimously agreed upon a general plan of world organization and embodied it in a charter which was then submitted to their home governments for ratification.

The prime object of this charter is to establish an organization which will prevent aggression, maintain world peace, and afford political secu-

rity to all nations by collective action. This it proposes to do by setting up a world organization consisting of a general assembly, a security council, an economic and social council, and an international court. The initial responsibility for maintaining world peace is centered in the security council which, for this purpose, may, as a last resort, call upon armed forces supplied by members of the world organization. Five great powers, the United States, Great Britain, Soviet Russia, China, and France, are to have permanent seats on this council; the six remaining seats would be held for two-year terms by representatives of states elected from the general assembly. This assembly is to consist of representatives from all the member nations. The international court does not differ essentially from that established by the old League of Nations. The economic and social council is intended to serve as a sort of "umbrella" for a number of subordinate agencies concerned with international, social, and economic questions, such as health protection, education, and labor relations.

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CHAPTER XXXII

CONSTITUTIONAL LIMITATIONS

The idea that man has rights behind and beyond the written laws is peculiar to us. The doctrine that there are certain cardinal, or natural rights of man which no government ought to, and ours cannot, take away is peculiar to us of the United States. — *Thomas M. Cooley.*

In the foregoing chapters the various powers and functions of Congress have been outlined. But the Constitution does more than grant powers. It imposes limitations. It sets limits upon the exercise of legislative authority. The makers of this Constitution did not believe in placing unlimited power anywhere; they were afraid of absolute power, no matter wheresoever lodged. Accordingly, they encircled Congress with a considerable number of limitations and prohibitions. Some of these relate to the way in which a power may be exercised, as, for example, the provision that all federal taxes shall be uniform throughout the United States. Others are in the nature of general prohibitions; that is, they forbid the exercise of certain powers under any circumstances. Thus, no export duties may be levied by Congress, no matter what the occasion or need may be. In some cases a power is prohibited to the states but permitted to Congress — the right to coin money is an illustration. In other instances, it is forbidden to both. Examples may be found in the provisions which place a ban on bills of attainder and forbid the creation of a nobility. Some of these limitations are scattered through the original Constitution while others have been inserted in the amendments, particularly in the first ten amendments.

CONSTITUTIONAL LIMITATIONS: THEIR NATURE AND SCOPE.

Let us look, first of all, at the specific restrictions which are placed by the Constitution upon the national government. Congress is forbidden to pass any bill of attainder. A bill of attainder is a legislative measure which inflicts a penalty without a judicial trial. Legislation of this sort was frequent during the Tudor and Stuart periods of English history. By bills of attainder men in high office were "attainted" of treason and sent to the scaffold without even the forms of judicial process, their

SPECIFIC LIMITATIONS:

1. BILLS OF ATTAINDER.

descendants being deprived of civil rights. Students of English history will recall the case of Thomas Wentworth, Earl of Strafford, who was beheaded during the reign of Charles I by order of parliament under a bill of attainder. By less drastic measures known as "bills of penalties," other Englishmen were fined, thrown into prison, or had their property confiscated. The enactment of attainders in any form (including bills of penalties) is prohibited by the American Constitution because its makers believed that the courts, not the legislature, ought to have the function of determining guilt or innocence.

2. EX POST FACTO LAWS.

The Constitution also forbids the passing of ex post facto laws. This prohibition has been somewhat misunderstood, for it does not apply to all laws which are retroactive in effect. The limitation applies to criminal laws only, and even here it does not affect laws which operate to the advantage of an accused person. In discussing this matter, one can tread upon firm ground, for the Supreme Court has given a full and exact definition of ex post facto laws. Such laws, in the words of the court, include:

> Every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action; every law that aggravates a crime, or makes it greater than it was when committed; every law that changes the punishment and inflicts a greater punishment than the law annexed to a crime when committed; and every law that alters the legal rules of evidence and requires less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[1]

In a word, the term includes only retroactive criminal laws which take away from an accused person some right which he possessed at the time named in the accusation. Laws which decrease the penalty or modify judicial procedure to the advantage of the accused are not forbidden, even though they be retroactive in effect. Thus, it is allowable to abolish the death penalty and give the benefit of this abolition to persons already convicted of capital crimes.

3. TREASON.

Taking a lesson from English political history, the makers of the Constitution also limited the power of Congress with respect to the definition and the punishment of treason. Treason is the oldest of crimes. In England it goes back to the time of the Saxon kings. Originally, it was the offense of killing the monarch, but in due course various other offenses were included, such as levying war against the king. During several centuries the category of treasonable offenses steadily widened, all manner of "newfangled and artificial treasons" being added to the list from

EARLY HISTORY OF THIS CRIME.

[1] Calder *v.* Bull, 3 Dallas 386 (1798).

reign to reign, until the unrestricted power to make and alter the law of treason became a weapon of abuse and oppression.

TREASON AGAINST THE UNITED STATES.

To make sure that there should be no such extension in the United States, the Constitution restricts the crime of treason to a certain definite offense: namely, that of levying war against the United States, adhering to its enemies, or giving its enemies aid and comfort. There must be open activity, not mere intent, for the Constitution further provides that "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." Aaron Burr was acquitted of treason in 1807 because he had committed no overt act, although it was proved that he had been engaged in a treasonable conspiracy. The penalty for treason, moreover, must in no case extend beyond the life of the person convicted. Punishment cannot be imposed upon the descendants of a traitor; or, as the words of the Constitution quaintly express it, the penalties shall not "work corruption of blood or forfeiture, except during the life of the person attainted."

TREASON AGAINST A STATE.

The foregoing applies only to the crime of "treason against the United States." But treason may also be committed against one of the states, and each state has the right to make its own definition of it. John Brown was executed in 1860 for treason against the State of Virginia. Each state may also make its own rules of evidence in treason cases and may prescribe such penalties as it sees fit. But, in such matters, it must keep within the other provisions of the federal Constitution, which require that all accused persons shall be given due process of law and the equal protection of the laws.

TREASON AND SEDITION DISTINGUISHED.

Treason should be distinguished from sedition. The latter is whatever the laws define it to be, for the Constitution incorporates no definition. Hence, Congress has been able to penalize as sedition various offenses which would be treason save for the absence of overt acts. Thus the Sedition Act of 1918 provided severe penalties for anyone who used any words intended to bring the military or naval forces of the United States into disrepute. This statute in effect created a number of "new-fangled and artificial treasons" under a different name. In other words, the constitutional provisions limiting the crime of treason do not prevent Congress from defining other offenses as sedition and prescribing penalties just as heavy as those imposed for treason.

4. DUE PROCESS OF LAW.

Then there is the constitutional requirement as to due process of law. In the Great Charter, which the barons of England wrung from King John in 1215, there was a stipulation, set

forth in resounding Latin, that no free man should be in any manner penalized save by "the lawful judgment of his peers or by the law of the land."

Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut autlagetur, aut exultur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae.[1]

This fundamental right of freemen was repeatedly emphasized in the landmarks of English civil liberty, such as the Petition of Right (1628), and in this evolution the phrase *per legem terrae*, or law of the land, came to be used interchangeably with the expression "due process of law." [2] In this form it passed into the Constitution of the United States as a part of the fifth amendment (1791) which provides that "no person shall be deprived of life, liberty or property without due process of law." The words "life, liberty or property," of course, hark back to colonial days and to the Declaration of Independence with its assertion of the citizen's right of life, liberty, and the pursuit of happiness.

THE MEANING OF "DUE PROCESS."

The meaning and scope of these four words "due process of law," however, have given the courts and the commentators a great deal of trouble, and even today their exact application is not absolutely clear. Few legal phrases in the whole history of jurisprudence have proved so elusive. Due process has become a sort of palladium covering all manner of individual rights. The highest American tribunal has refrained from committing itself to any hard and fast definition of the term, preferring rather that "its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise." [3]

DANIEL WEBSTER'S DEFINITION.

But all students of American government know in a general way what the phrase means. It means that there must be, in all actions to deprive a man of his life, liberty, or property, an observance of those judicial forms and usages which, by general consent, have become associated with fair dealing. Daniel Webster, in a famous argument before the Supreme Court, gave a definition of due process which will probably serve the layman as well as any other. It is the process of law, he asserted, "which hears before it condemns,

[1] No free man shall be arrested, or imprisoned, or evicted from his land, or outlawed, or exiled, or in any other way endamaged, nor will we impose upon him, or send him our commands, save by the lawful judgment of his peers or by the law of the land. *Magna Carta*, Article 39.

[2] The phrase "due process of law" first appeared in a statute passed by parliament in the fourteenth century (28 Edw. III, 3). We have the word of the great English jurist, Sir Edward Coke, in his *Institutes*, that it was there used as the equivalent of the older phrase "law of the land."

[3] Twining *v.* New Jersey, 211 U. S. 78 (1908).

which proceeds upon enquiry, and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."[1]

THE APPLICATION OF DUE PROCESS TO JUDICIAL PROCEDURE.

Thus, the requirement of due process clearly renders invalid such things as acts of confiscation without judicial trial; laws which arbitrarily take property from one individual or group and give it to another; laws which retroactively reverse judgments of the regular courts; and, in fact, all arbitrary exertions of power in the form of legislative enactments or executive decrees. The courts have held that due process of law requires a hearing of the issue before it is decided; but this does not necessitate that the hearing shall be by a jury or even by a judge. What constitutes a fair hearing must be determined by the circumstances. Questions involving a deprivation of property are sometimes determined by administrative officers, as, for example, in the sale of lands for nonpayment of taxes. The right of an alien immigrant to enter the United States is determined by the immigration authorities, not by a judge and jury. The right of a newspaper to be given the second-class mailing privilege is decided by the postal authorities, not by the courts. In other words, the adjudication of such questions by an administrative board, or even by a single administrative officer, is not deemed to be a denial of due process as long as the proceedings are characterized by the essentials of fair play to those whose liberties or property are concerned.[2] This, to be sure, is not a very satisfactory explanation to anyone who desires to know exactly what due process of law means, but it is about as good as can be given under the circumstances.

DUE PROCESS IN THE STATES.

It will be noted that the due process requirement appears twice in the Constitution, once as a limitation upon Congress (fifth amendment) and once as a limitation upon the states (fourteenth amendment). The Supreme Court has applied it with an equal hand to both. But the states have been the chief offenders in their attempt to circumvent the due process limitation. More especially has this been the case with numerous laws which state legislatures have enacted for the ostensible purpose of promoting the public safety or public health, but which, in reality, have been designed to deprive individuals or corporations of their property in an arbitrary way. For within the term "property" is included not merely what already belongs

[1] The Dartmouth College Case, 4 Wheaton 518 (1819).

[2] Those who wish to pursue this subject further may be referred to Rodney L. Mott, *Due Process of Law* (Indianapolis, 1926), John M. Mathews, *The American Constitutional System* (new edition, New York, 1940), and L. P. McGehee, *Due Process of Law under the Federal Constitution* (Northport, N. Y., 1906).

to its owners but the right to acquire further belongings in any lawful manner, in other words, the right to freedom of contract.

In this connection a word should be added with respect to what is known as the "police power" of the nation and the states. It is one of the most important and comprehensive among governmental powers. Speaking broadly, it may be defined as the right of a government to regulate the conduct of its people in the interest of the public safety, health, morals, and convenience. Under this all-embracing authority a government may make regulations concerning the safety of buildings, the abatement of nuisances, the regulation of traffic, the reporting of communicable diseases, the inspection of markets, the sanitation of factories, the hours of work for women and children, the sale of intoxicants, and countless other matters. Such regulations inevitably involve a deprivation of someone's liberty or property; but this does not render the regulations unconstitutional provided they represent a reasonable exercise of the police power and are designed to accomplish a legitimate public purpose.[1]

DUE PROCESS IN RELATION TO THE POLICE POWER.

There is a twilight zone, however, in which the scope of the police power is not yet clear. May the laws deprive a citizen of his property in order to promote the aesthetic welfare of the community — for example, by providing that no one may build a house on his own land until the type of architecture has been approved by a municipal art commission or some other body? Such a condition may be imposed by subdividers or sellers of land, at the time of sale, but not by the public authorities. Is it allowable to provide by law that residential property in designated sections of a city shall not be sold or rented to colored people? Can such a measure be justified as a reasonable regulation in the interest of the public safety, health, morals, or convenience? The Supreme Court has held that it cannot.[2] May the government forbid an owner to take more than a specified amount of oil or water out of his own wells? The court has held that it can.[3] In brief, each issue must stand on its own feet. In times of war or other emergency a regulation may be reasonable when, under normal conditions, it would constitute an arbitrary deprivation.

HOW FAR DOES THE POLICE POWER EXTEND?

Due process of law is not a stereotyped thing. A true philosophy of liberty must permit adaptation to new circumstances. It follows, therefore, that any legal proceeding which is in furtherance of the public good, and which preserves the

DUE PROCESS IS NOT STATIONARY.

[1] C. B. & Q. R.R. *v.* Illinois, 200 U. S. 561 (1906).
[2] Buchanan *v.* Warley, 245 U. S. 60 (1917).
[3] Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900).

principles of liberty and justice, must be held to be due process of law. To declare, once and for all, that certain rigid rules must in every case be observed would be to mummify all legal progress. The requirement as to due process was framed to afford protection against gross legislative unfairness; it was not intended to become a barrier to the reasonable regulation of individual liberty or of private property in the interests of social and industrial justice.

Another constitutional restriction provides that "private property shall not be taken for public use without just compensation." To understand the nature of this limitation, one must know something about the right of eminent domain. This right of a government to take private property for public use arises from the necessity of acquiring land for forts, navy yards, post offices, customhouses, national parks, prisons, lighthouses, highways, etc. Hence the *domain*, or "property-taking right," of the nation and the state is *eminent* or paramount; in other words, it is superior to the property-holding right of any individual.

5. THE RIGHT OF EMINENT DOMAIN.

But the Constitution imposes a threefold limitation upon the right of eminent domain. First, the taking of private property must be for a *public* purpose. Property cannot be taken by the government from its private owners and then turned over for a nonpublic use by some other private individual or corporation. Second, "just compensation" must be paid to the owner. Third, the owner of property must be given due notice before his property is taken away from him.

LIMITATIONS UPON THE RIGHT OF EMINENT DOMAIN:

All private property, of whatever sort, including not only land and buildings, but right of ways, ships, supplies, even electric current and contracts for delivery of goods, is subject to the right of eminent domain provided it is exercised for a public purpose. The courts have been liberal in their interpretation of this term. They have upheld the taking of land not only for post offices and other buildings but for all purposes related to the functions of government. Moreover, the government may delegate its right of eminent domain to counties, cities, school districts, or even to railroads or other corporations engaged in public or quasi-public enterprises. The right may be delegated to a company which is mainly operated for private gain, provided it is engaged in a business which is "affected with a public interest." Hence, the right to take private property, on payment of just compensation, has been frequently given by state legislatures to light and power companies, irrigation districts, and, in some instances, to endowed colleges. But it cannot be delegated to strictly private concerns where no

(a) AS TO PUBLIC PURPOSE.

color of public necessity appears. The line, of course, is difficult to draw because all forms of private business are affected with a public interest in some degree.

When private property is taken for a public or a semipublic purpose, the constitutional requirement is that "just compensation" must be paid to the owner. But how is this compensation determined? As a matter of practice, the officers of the government first make their own valuation and offer the owner what they deem to be just. The owner, in most cases, rejects this offer and asks for more. Then, by the usual process of bargaining, an agreement on some compromise figure may be reached. But, if the owner cannot get what he believes to be fair compensation in this way, he has an appeal to the courts. Nevertheless, it is allowable to have the decision made by an administrative tribunal, with no appeal to the regular courts on questions of fact, provided a fair administrative procedure is followed.

(b) AS TO JUST COMPENSATION.

Many limitations with respect to methods of judicial procedure are incorporated in the national Constitution, especially in the first ten amendments. These limitations relate to jury trial, the rules of evidence, the nature of punishments, and to the placing of anyone in double jeopardy for the same offense. But such restrictions can be more appropriately explained in a later chapter dealing with the judicial power of the United States.[1] Let it be made plain at this point, however, that the limitations of the national Constitution in this respect apply to the procedure of the federal courts only; they do not govern the procedure of the state courts. The latter are governed, as to ordinary judicial procedure, by the terms of their own state constitutions, provided, of course, that they do not run counter to the limitations imposed upon them by the fourteenth amendment. The privilege of trial by jury in a particular case in a state court, for example, cannot be claimed unless the state constitution and state laws have provided for it.

6. JUDICIAL FORMS AND PROCEDURE.

As there are implied powers in the Constitution of the United States, so there are implied limitations, that is, limitations which do not appear in express terms but follow from the general nature, form, and purposes of the federal government. The Constitution, for example, does not expressly forbid Congress to delegate any of its lawmaking powers to the President, or to the heads of departments, or to the various administrative boards, or even to the people.

SOME IMPLIED LIMITATIONS.

Yet it is "one of the settled maxims in constitutional law," according to one of America's foremost authorities on this subject,

[1] See Chapter XXXIV.

that the power conferred upon Congress to make laws cannot be delegated by that department to any other body or officer. Where the sovereign power of the state has located that authority, there it must remain, and by that constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative [of lawmaking] has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.[1]

A NATION-WIDE REFERENDUM IMPOSSIBLE.

Because of this well-recognized limitation, a nation-wide referendum as a means of accepting or rejecting a law would not be constitutional. Congress might, if it so chose, submit a question to the people as a means of securing an advisory test of public sentiment; and the Democratic national platform of 1924 proposed that the question of adhering to the League of Nations should be submitted in this way; but the formal enactment of all federal statutes, as well as the conduct of foreign policy and the undivided responsibility therefor, must remain exactly where the Constitution placed it. Congress cannot delegate its legislative power and responsibility even to the whole people. To establish the principle of direct legislation by the people, as far as national lawmaking is concerned, would require an amendment to the Constitution.

ADMINISTRATIVE DISCRETION MAY BE DELEGATED.

But while Congress may not delegate its lawmaking power, it may delegate to some other body (or to some official) the function of determining when and how the provisions of the law are to be carried out. This latter is held to be a ministerial, not a legislative, function. It is permissible for Congress to provide, for example, that a law shall go into effect whenever the President shall adjudge certain conditions to exist and shall so announce by proclamation.[2] It may make an appropriation for the relief of unemployment and leave to the President the discretion to determine how the money shall be spent. But it must retain the ultimate lawmaking power in its hands. That is one of the reasons why the National Industrial Recovery Act was held unconstitutional by the Supreme Court in the Schechter case.[3] This statute had delegated to the President full power to accept or reject codes of fair competition submitted to him by persons engaged in particular industries, and when accepted by the chief executive, such codes were to have the force of law. The court held this procedure to involve a surrender by Congress of its lawmaking authority.

[1] T. M. Cooley, *Treatise on Constitutional Limitations* (7th edition, Boston, 1903), p. 163.
[2] Field *v.* Clark, 143 U. S. 649 (1892).
[3] Schechter *v.* United States, 295 U. S. 495 (1935).

Despite the judicial insistence upon this traditional principle of nondelegation, however, the growing complexity of conditions with which modern legislation must cope requires that Congress allow a considerable degree of administrative discretion in interpreting and enforcing that legislation. Laws are not by nature resilient or flexible. Their general provisions, when unmodified by the exercise of official discretion, are almost sure to work injustice. The best system of regulation is one which can be varied in strictness as the occasion demands. Such a system obviously requires that room for the exercise of judgment, in the administration of the laws, shall be vested in some executive officer or board. Congress, therefore, has had no escape from the necessity of giving large discretionary powers to the President, as well as to various federal boards, such as the interstate commerce commission, the board of governors of the federal reserve system, the federal trade commission, the national labor relations board, the securities and exchange commission, and even to such administrative officials as the postmaster general or the commissioner of immigration and naturalization. Thus the rule on this broad question of nondelegation may be briefly stated by saying that while the *substance of legislative power* may not be delegated, it is allowable to give the executive branch of the government a large amount of leeway in determining the detailed procedure by which the laws shall be put in operation.

IMPORTANCE OF THIS PRINCIPLE.

One result of this policy has been to take the country a long way from its old legal traditions. During the past quarter of a century, there has been a steady growth of "administrative law" — a term which on its very face confutes the idea that we have a clear separation between legislative and administrative authority. For it implies that administrators, as well as legislators, are making the laws of the land by promulgating, at their own discretion, orders and regulations which have the force of law. So rapidly has this system of administrative lawmaking been extended that today a large part of the federal government's authority is exercised by the issue of executive orders, administrative decisions, departmental rulings, and rules proclaimed by all sorts of government boards. We have a general law relating to the federal income tax, for example, but there are literally thousands of points which this law does not cover. Each one of these, when it arises, is covered by a ruling or order issued from the bureau of internal revenue. These rulings have become so numerous and so complicated that only an expert can thread his way through them.

IT HAS INTRODUCED A NEW FEATURE INTO AMERICAN GOVERNMENT.

Or, take another example — the orders and rulings of the interstate commerce commission. They have become almost innumerable and

cover all sorts of matters relating to rates, service, accounting, and financing in connection with the railroads. Likewise, the Social Security Act is couched in general terms, with relatively few provisions covering matters of detailed administration. Hence, during the past decade, it has been incumbent upon the social security board and related agencies to develop a vast network of orders and regulations on all sorts of questions arising out of its efforts to translate the law into an operating security system. All this contributes to the making of a huge body of "administrative law" which is enforceable by the courts, although its provisions have not been literally sanctioned by the regular lawmaking bodies at all. It has been framed and issued under a general grant of authority made by these lawmaking bodies. Some conception of the annual volume of such administrative legislation can be gained by scanning the pages of the *Federal Register*, the official compilation of federal administrative orders and regulations, four or five numbers of which have been issued regularly each week since 1935.

ITS RAPID GROWTH.

All this does not imply that the development of administrative law in the United States is something to be deplored. Regulation by administrative order is usually more equitable and more effective than regulation by broad legislative provisions. The latter cannot bend without being broken. One should remember that there is nothing dangerous about a government of men so long as it is a *government of men controlled by law*. So long as the administrative authorities are required to keep within the boundaries set for them by legislative enactment, the danger of bureaucratic autocracy is small. But if Congress is ever permitted to delegate the substance of its lawmaking power, and give the President or his subordinates a wide-open authority to make rules with the force of law — if that ever happens, there will be an end to one of the basic principles on which the American political system has been built up.

ITS VALUE AND LIMITATIONS.

The foregoing are not the only limitations upon the powers of Congress. Some others, more particularly those which relate to the rights of the citizen, have been discussed in a previous chapter; others, which concern judicial procedure, will be explained in connection with the work of the federal courts. A complete list of constitutional limitations in the United States would probably mount into the hundreds. Congress, as someone has said, is a leviathan in chains. Perhaps we have limited the powers of the national legislature to a greater extent than is necessary, and it is probable that if the people of the United States were reframing their Constitution tomorrow, some of these limitations would be left

A FINAL WORD ON CONSTITUTIONAL LIMITATIONS.

out. They were inserted in an age when legislative tyranny was greatly dreaded, and today that danger has passed by. The present generation, heeding European experience, is more afraid of executive tyranny or dictatorship. There is no likelihood nowadays that Congress would pass bills of attainder, or take property without compensation, or establish an American order of nobility — even if the limitations which relate to these things were stricken from the Constitution altogether. On the other hand, the tendency towards aggrandizement on the part of the executive in all countries is one that students of government should note and reflect upon. Does it mean that the nineteenth-century habit of identifying democracy with the supremacy of legislative bodies is to be discarded and replaced by the concentration of power in a single hand?

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CHAPTER XXXIII

TERRITORIES, INSULAR POSSESSIONS, AND SPECIAL AREAS

The reluctant obedience of distant provinces generally costs more than it is worth. — *Lord Mahon.*

One does not usually think of the United States as a colonizing country, yet the history of the nation is an almost unbroken chronicle of territorial expansion. The area of the original thirteen states was less than one tenth of the territory under the flag of the United States today. No other nation has had such an increase during the past fifteen decades or has filled its new acquisitions so largely with its own people.

THE UNITED STATES AS A COLONIZER.

Most Americans do not realize what an imperial area they possess. Take a map of the United States and superimpose it upon a same scale map of Europe. San Francisco will fall where Liverpool is, while Baltimore drops east of Constantinople. New Orleans keeps company with Palermo, while Minneapolis is up near Moscow. The entire kingdom of Italy, with its more than forty-two million people is just a little larger than the single state of Colorado. Put England, France, and Germany together and you have a smaller combined area than the two states of Texas and California. Indiana is bigger than Austria, while Belgium would fit comfortably into the niche that Maryland occupies. In a geographical sense the United States is not a nation but a league of nations.

THE IMPERIAL AREA OF TODAY.

The history of American national expansion may be divided into two periods. First, there is the era extending from the close of the Revolutionary War to the year 1867. During this interval the United States acquired by successive treaties all the land included in the Northwest Territory, as it was then called, together with the Louisiana Purchase, and Florida. Toward the middle of the nineteenth century the nation also secured by conquest from Mexico, and by the admission of territories which had declared their independence of Mexico, the enormous areas of

THE TWO PERIODS OF EXPANSION:

1. WITHIN THE PRESENT BOUNDARIES.

Texas, the Southwest, and the South Pacific slope. Title to the North Pacific slope, up to the forty-ninth parallel, had been acquired a few years earlier by a treaty with Great Britain. All this territory was contiguous and could eventually be parceled into states of the Union. Hence, the expansions of this period merely represented the rounding out of national boundaries and presented no problems of an external character.

But the second period, extending from 1867 to the present time, has involved various territorial acquisitions of a different nature. By the purchase of Alaska from Russia in 1867, the United States acquired its first noncontiguous possession other than a few small guano islands. This precedent was not followed, however, by any further ventures into outlying areas until 1898, when the Philippines, Puerto Rico, and Guam were acquired; and in the same year Hawaii was annexed at the request of its own government. In 1899 an agreement with Great Britain and Germany gave to the United States certain islands in the Samoan Archipelago, and in 1904 the Panama Canal Zone came under American control as the result of a treaty made with the new Republic of Panama. Finally, in 1917, the Danish West Indies were acquired by purchase.

2. OUTSIDE TERRITORIES AND INSULAR POSSESSIONS.

All these acquisitions differed from those of the preceding period in that they are separated from the main territory of the United States and are not necessarily assured of admission to statehood at any future date. Since 1898, therefore, the United States has faced the fact that its jurisdiction includes two classes of territory; one enjoying the full rights and privileges of statehood, the other made up of outlying possessions, some of which must continue to be colonies in the usual sense of the word, no matter by what name they may be officially designated.[1] Phrases do not alter facts. A mother country does not eliminate colonial problems by resorting to a twist in terminology. Dependent territories, distantly situated, and largely peopled by an alien race, present much the same problems to home governments everywhere.

DIFFERENCES BETWEEN THE TWO FORMS OF EXPANSION.

The makers of the Constitution foresaw that the Union would eventually comprise more than the thirteen original states. They knew, of course, that a large region of hinterland was already being governed by the confederation under the terms of the Northwest Ordinance and that this territory would eventually be carved into states as the ordinance contemplated. Hence, they made provision that the territory "belonging to the United States"

THE CONSTITUTIONAL BASIS OF EXPANSION.

[1] It is hardly conceivable, for example, that the Panama Canal Zone, Samoa, and the Virgin Islands will ever be admitted as states of the Union.

should be governed as Congress might decide and that new states could be admitted to the Union by Congress at its discretion, subject to certain prescribed limitations. The Constitution did not, however, in express terms bestow on Congress the right to acquire new territory; and, in connection with the Louisiana Purchase of 1803, it was argued in some quarters that Congress had no such right. The Supreme Court, however, has settled this question by repeatedly deciding that the United States, as a nation, has the same right to acquire territory as any other sovereign nation.[1] The power to make treaties implies the power to gain territories by treaty. The power to declare and wage war implies the right to make conquests. The power to admit new states implies the right to acquire areas out of which new states may be created.

CONSTITUTIONAL QUESTIONS CONNECTED WITH OUTLYING POSSESSIONS.

But admitting the right of the United States to acquire territory, many other questions arose to be settled. Is the control of Congress over such territory complete and unrestricted, or is Congress bound there by all the limitations of the national Constitution? Have the inhabitants of territories the same constitutional rights as citizens of the states — for example, the right to keep and bear arms and the right to trial by jury? Is a Hawaiian or a Puerto Rican entitled to these rights by the mere fact that the American flag flies over his islands? And what about the operation of such laws as Congress may make? Do they extend to these islands as a matter of course or only when their extension is expressly provided for? Does a tariff law, for example, apply only to merchandise which comes into the United States proper, or to goods entering the insular possessions as well? All these questions have come before the Supreme Court at one time or another and have been answered by that tribunal, hence the constitutional status of territories and insular possessions is now fairly well settled.

THE RULES AS ENUNCIATED BY THE SUPREME COURT.

Summarizing the main features in this chain of judicial decisions, one may lay down the following general rules: The power of Congress over the outlying territories of the United States is practically complete. The inhabitants of the insular possessions are not citizens of the United States unless it is so provided by treaty or unless Congress extends citizenship to them. The provisions of the federal Constitution relating to the rights of citizens (for example, the right of trial by jury) do not extend to the inhabitants of all the territories unless and until Congress so pro-

[1] "By the law of nations, recognized by all civilized states, dominion over new territory may be acquired by discovery and occupation, as well as by cession or conquest." Jones *v.* United States, 137 U. S. 202 (1890).

vides. In the Insular Cases (1900) the Supreme Court set up a distinction between "incorporated" territory on the one hand (that is, territory which is treated as an integral part of the United States) and "unincorporated" territory which has not been so recognized by Congress. On this basis, Hawaii and Alaska are incorporated territories, while Puerto Rico, Guam, Samoa, the Canal Zone, and the Virgin Islands constitute an unincorporated group.

INCORPORATED AND UNINCORPORATED TERRITORIES.

Concerning the incorporated territories (Alaska and Hawaii), all the applicable limitations of the Constitution are in full force; but elsewhere Congress is bound only by those "fundamental" provisions of the Constitution which automatically extend to all American soil. The Supreme Court did not explain, however, just what provisions are fundamental but left this to be determined in particular cases as they might arise. As respects tariff laws, it has held that the provision as to uniformity of taxation is not fundamental and, hence, that Congress may provide a special rate of duty on goods coming into the unincorporated territories, such as Puerto Rico and the Virgin Islands, or from them into the United States. Likewise, it has held that the requirement of a jury trial is not one of the fundamental provisions which automatically extend to the unincorporated territories.

EXTENSION OF "FUNDAMENTAL" RIGHTS TO THE UNINCORPORATED TERRITORIES.

PRESENT GOVERNMENT OF TERRITORIES AND POSSESSIONS

Owing to the diversity in local conditions among the various possessions of the United States, no attempt has ever been made to establish a uniform scheme of government for all of them. Each is somewhat differently organized from the others. Since 1912, Alaska has been a fully organized territory, just as Arizona and New Mexico used to be before they were admitted as states, and all laws passed by Congress apply to Alaska as a matter of course. Its citizens are American citizens. Alaska has a governor appointed by the President of the United States and a territorial legislature. This legislature is made up of two chambers, a senate and a house of representatives, the members of both being elected by the people. It has the usual lawmaking powers, but its acts must not be "inconsistent with the Constitution and the laws of the United States." There is universal suffrage but with a literacy test. The governor has a veto power similar to that of the President, and laws passed by the Alaskan legislature may also be disallowed by Congress. Four federal district courts have been

TERRITORY OF ALASKA.

established in the territory along with a system of local territorial courts. Alaska is represented in Congress by a delegate who may speak there but has no vote.

Hawaii is the other fully organized territorial possession. Prior to 1893, the Hawaiian Islands had a monarchial form of government with a native dynasty, but in that year a revolution abolished the monarchy and set up a provisional government which, in turn, gave way to a republic. Then, in 1898, the government of the Hawaiian Republic applied for and obtained annexation to the United States by joint resolution of Congress.[1] Two years later, Congress passed the organic act on which the present Hawaiian government rests. The territorial governor of Hawaii (who must be a resident of the islands) is appointed by the President of the United States with the advice and consent of the Senate. He is assisted in executive work by various administrative officials, a secretary, treasurer, attorney general, etc. All these, except the secretary, are appointed by the territorial governor with the concurrence of the Hawaiian senate. Subject to the terms of the organic act, the Hawaiian legislature, consisting of two elective chambers (a senate and a house of representatives), makes the laws, determines the taxes, and provides for the annual expenditures. The governor possesses the usual right of veto, which may be overridden by a two-thirds vote of both houses.

TERRITORY OF HAWAII.

In the organic act of 1900 there is, however, an important provision which reads as follows:

> In case the legislature fails to pass appropriation bills providing for payment of the necessary current expenses of carrying on the government and meeting its obligations as the same are provided for by the then-existing laws, the governor shall, upon the adjournment of the legislature, call it in an extra session for the consideration of appropriation bills and until it shall have acted the treasurer may with the advice of the governor make such payments, for which purpose the sums appropriated in the last appropriation bills shall be deemed to have been reappropriated.

THE APPROPRIATION SAFEGUARD.

In other words, the territorial legislature cannot use its control of expenditures in such a way as to coerce the executive into submission by stopping the wheels of government. Hawaii also has its own territorial courts, likewise a federal district court. The voters elect one delegate to the House of Representatives at Washington, but he has no vote there. All elections in Hawaii are by universal suffrage, but with one important

[1] A treaty providing for the annexation was first negotiated, but the United States Senate refused to ratify it by the requisite two-thirds vote. Then, after some delay, a joint resolution was passed by a majority vote in both Houses and signed by the President. The annexation was accomplished by this procedure.

reservation: namely, that voters must be able to "speak, read, and write the English or the Hawaiian language." This excludes a small number of the Japanese and Chinese who form a large element in the population of the islands. Although the voters of the territory have recently expressed a desire for statehood in a referendum, the problem of extending statehood has hitherto been complicated by the fact that the population of Hawaii contains so heavy a proportion of Japanese (*Isei*) and of native-born persons of Japanese ancestry (*Nisei*). In view of this circumstance, the nation's most important defense bastion in the Pacific probably will be kept, for the time being at least, under a greater degree of federal control than statehood would permit.[1]

PUERTO RICO.

Puerto Rico, although legally rated as an unincorporated territory, has a form of government very similar to that of Hawaii. During the war with Spain, the American army occupied this Caribbean island and in the two years following the withdrawal of the Spanish forces it continued under military government. People do not always realize how easy it is for an army to provide, out of its own resources, all the administrative machinery that is necessary for temporarily governing a conquered territory. The commander in chief with his staff transform themselves into a governor and council; the engineer corps provides a department of public works; the paymaster's department takes charge of the finances; the medical and sanitary corps become a department of public health; the judge advocate sets up a judicial system; and the military police take over the work of patrolling the streets. To say that Puerto Rico was for two years under military rule does not mean, therefore, that the affairs of the island were crudely or arbitrarily handled. The system of military rule did not quickly give way to an organized civil government because it was found to be inefficient, but because of the general aversion of the American people to continued military government in any portion of their territory.

PRESENT GOVERNMENT OF THE ISLAND:

The present frame of Puerto Rican government has its basis in the Foraker Act of 1900, considerably modified by the organic statute of 1917. This later statute conferred American citizenship upon Puerto Ricans and extended to them most of the constitutional rights of citizens in the United States, a notable exception being the right to trial by jury. At the head of the island administration is a governor, appointed by the President with the consent of the Senate. He holds

1. THE EXECUTIVE.

[1] Immediately after the attack on Pearl Harbor, martial law was declared in Hawaii and a military governor took control. The privilege of the writ of habeas corpus was temporarily suspended, and military courts (provost courts) went into operation. Later, when the danger of invasion diminished, the strictness of military control was considerably relaxed.

office during the President's pleasure. The governor is assisted by seven heads of executive departments, of whom three (the attorney general, the auditor, and the commissioner of education) are similarly appointed by the President, while the rest (including the heads of the other departments; namely, interior, health, agriculture and commerce, and labor) are appointed by the governor with the approval of the insular senate. These seven heads of departments form an executive council, assisting the governor in an advisory capacity.

2. THE LEGISLATURE.

The Puerto Rican legislature consists of two chambers, a senate and a house of representatives. The senate contains nineteen members, of whom two are elected from each of seven senatorial districts and five elected by the voters of the island at large. The house of representatives is composed of thirty-nine members, one from each of thirty-five districts and four elected at large. Puerto Rico has universal suffrage but with a literacy test for voting.

ITS POWERS.

The legislature may levy taxes (except taxes on imports) and may authorize borrowing on the credit of the island. It also determines the expenditures, but if the two chambers do not agree on appropriations for the support of the island government, the sums voted for the preceding year are deemed to have been reappropriated. The provision relating to the governor's veto power is a peculiar one. The governor may veto an act of the Puerto Rican legislature; then, if the legislature reenacts it by a two-thirds vote, the measure goes to Washington where it is laid before the President. If the President approves the measure, or does not disapprove it within ninety days, it becomes effective. But Puerto Rican laws are also subject to disallowance by Congress, as in the case of the other territories, although, as a matter of fact, Congress does not often interfere. A resident commissioner from Puerto Rico, elected by popular vote, has the right to sit in the House of Representatives at Washington, but has no vote in that body.

3. THE COURTS.

Puerto Rico has a judicial system which includes a United States district court and a series of territorial courts headed by the supreme court of Puerto Rico. The judges and other officers of the United States district court are, of course, appointed by the President, while those of the territorial courts are named by the governor of the island and the Puerto Rican senate — with the exception of the territorial supreme court, in which the five justices are also appointed by the President.

About forty miles east of Puerto Rico are the Virgin Islands consisting of St. Croix, St. Thomas, St. John, and several smaller islands which were purchased from Denmark in 1917. The organic act of 1936 con-

ferred citizenship upon the natives of the islands. It provided for a governor appointed by the President and the Senate for an indefinite term and for a legislature of a somewhat unusual type. This legislature is composed of two municipal assemblies, sitting jointly. One of them is elected by the voters of the island of St. Croix and the other by the voters in the two islands of St. Thomas and St. John. In this joint assembly, which meets every other year, a two-thirds vote is necessary to enact any measure. Then it goes to the governor for his approval. If it is disapproved by him, it is transmitted to the President of the United States, who has three months in which to approve or disapprove. This action is not necessarily final because Congress may, if it chooses, disallow the measure after the President has given his approval. But the presidential veto could be interposed against such disallowance, in which case the action of Congress would require a two-thirds vote to make it effective.

THE VIRGIN ISLANDS.

Air travel has given America's outlying possessions in the Pacific a new significance and they have acquired further importance as strategic outposts in the war with Japan. Guam, Midway, and American Samoa are administered by naval commanders appointed by the secretary of the navy. Local government is left to the natives. Congress has as yet made no formal provision for the administration of any of these islands, although a congressional investigating commission made a recommendation in 1930 that an organic act and a bill of rights be enacted for American Samoa. Jarvis, Baker, and Howland islands, which also belong to the United States, and Canton and Enderbury islands, over which the United States and Great Britain are joint sovereigns, are under the administrative supervision of the department of the interior.

MINOR PACIFIC ISLANDS.

The Panama Canal Zone is a strip of territory across the isthmus about ten miles in width, with the Canal running through the middle. The United States acquired from the Republic of Panama in 1904 "the perpetual use, occupation, and control" of this strip. It is administered by a governor appointed by the President with the Senate's approval. Within the Canal Zone various courts, including a federal district court, have been established and town governments organized.

THE PANAMA CANAL ZONE.

Unlike Great Britain and France, the United States has no protectorates, that is, territories which are independent but under American protection. Nevertheless, by various treaties with certain Caribbean islands and Central American republics, there has been established from time to time what virtually amounted to a protectorate. With Cuba, for

example, an arrangement existed for many years permitting American intervention under certain conditions, and in 1906 such intervention took place as a means of preserving order.[1] The Cuban administration then remained in the hands of American officials for more than two years. But in 1934 this arrangement for intervention was brought to an end. Temporary agreements have also been made occasionally with Haiti, Santo Domingo, and Nicaragua, which provided that the United States might intervene when necessary to secure the adequate protection of foreign property or the holding of honest elections. These agreements sometimes led to intervention and this made them unpopular. For the most part they are now abrogated.

RELATIONS WITH CUBA AND OTHER CARIBBEAN REPUBLICS.

In the government of the United States there is no minister or secretary for the colonies, as in Great Britain and other European countries. In 1934 a "division of territories and island possessions" was created by executive order within the department of the interior, and this agency now has immediate supervision over the affairs of Alaska, Hawaii, Puerto Rico, the Virgin Islands, and certain of the minor Pacific possessions, including Howland, Baker, and Jarvis islands. After 1939, all control still exercised over the Philippines was transferred to this division. The Canal Zone continues under the supervision of the war department, where it was placed in 1914. American Samoa, Guam, Midway, and Wake islands, as already indicated, are under the jurisdiction of the navy department.

THE AGENCIES OF HOME SUPERVISION.

THE PHILIPPINE COMMONWEALTH

The Philippine Islands, once a full-fledged possession of the United States, were given a different status in 1935. How this came about requires a few paragraphs of explanation. To begin with, the Philippine Islands were ceded to the United States in 1898 by a treaty with Spain. Military rule, complete or partial, continued for nearly three years. During this interval, however, a commission was sent to the islands to devise a system of civil government and also to take over some governmental functions from the military authorities. All this was done by order of the President, who controlled the administration of the islands by virtue of his powers as commander in chief of the army. To remove any possible doubt as to the legality of this situation, however, Congress gave the President "all the military, civil and judicial powers necessary to govern the Philippines . . .

ACQUISITION AND EARLY GOVERNMENT.

[1] H. F. Guggenheim, *The United States and Cuba* (New York, 1934).

until otherwise provided." Under this authority the President, in 1901, appointed a civil governor and provided the islands with an appointive legislative body or commission made up of both Americans and Filipinos.

THE LAW OF 1902.

This temporary civil government functioned for about a year, that is, until Congress was able to prepare and enact an organic law for the islands, which it did in 1902. The chief provisions of this law were as follows: the executive power was to be vested in a governor general, appointed by the President with the consent of the Senate, and in heads of administrative departments, similarly appointed. These administrative officials, along with four other appointive members, were to constitute the Philippine commission, which was to serve as the sole legislative body until conditions should warrant the election of an assembly; thereafter it was to function as the upper chamber of the legislature. The conditions were fulfilled, and the first Philippine assembly met in 1907.

THE ORGANIC ACT OF 1916.

Thus matters continued until 1916, when an organic act (commonly known as the Jones Act) made three important changes in the government of the islands. It gave a larger degree of self-government, increased the powers of the governor general, and replaced the Philippine commission by an elective senate. Under the terms of this act, the chief executive power was exercised by a governor general, appointed by the President with the concurrence of the United States Senate. There was also a vice-governor, similarly appointed, and serving as head of the department of public instruction. The heads of the other administrative departments (such as justice, finance, etc.) were appointed by the governor general with the approval of the Philippine senate. In addition, the governor general prepared the annual budget and laid it before the Philippine legislature for its approval; but if the legislature did not make the necessary appropriations, it was provided that those of the previous year should be deemed to have been reappropriated. The governor general also had the right to veto any action of the legislature and if the latter overrode this veto by a two-thirds vote, the issue was then referred to Washington, where the President had six months in which to decide it. Congress, moreover, had a right under the Jones Act to annul any law passed by the Philippine legislature. This legislature was composed of two chambers, a senate and an assembly, the membership of both being chiefly elective but with a few appointive members to represent the non-Christian districts.

The organic act of 1916 asserted the intention of the United States to recognize the independence of the Philippines "as soon as a stable government can be established therein." And during the next five years

the Washington authorities gave the Philippine legislature an almost free hand. Governor General Harrison, who served during this period, reported that the islands were fit for independence. But President Harding in 1921 and President Coolidge in 1926 thought it well to have the question looked into by special commissioners. In both cases these commissioners reported that the islands were not yet prepared for an independent status although they might ultimately become so, and Congress accepted this view of the situation.

THE ISSUE OF INDEPENDENCE.

Nevertheless, the clamor for independence continued and it was reinforced in the United States by various business interests, which desired to have tariff duties placed upon imports (sugar, coconut oil, etc.) from the Philippines, as well as by American labor organizations which hoped that the granting of independence would put an end to Filipino immigration. Over the veto of President Hoover, therefore, Congress passed a measure (January, 1933) which provided that complete independence would be granted to the Philippines after a "preparative" period of ten years, with a stipulation that the islands should be governed during this interval as a commonwealth under a constitution approved by the President of the United States and adopted by vote of the Philippine people. The law of 1933 provided that, in order to become effective, it would have to be accepted by the Philippine legislature within a year, but this body refused its approval and sought to obtain better terms. Failing in this, Congress was persuaded in 1934 to pass a new independence law (which differed but little from its predecessor) and this was accepted by the legislature in Manila.

THE INDEPENDENCE ACT OF 1934.

Under the terms of this Independence Act, the Philippine people at once elected a convention of delegates which framed a constitution for the Commonwealth of the Philippine Islands. This, after having been submitted to the President of the United States and approved by him, was ratified by an overwhelming majority of the Philippine voters. Thereupon the officers of government under the new constitution were elected and took office in November, 1935. On their inauguration, the governmental system which had been maintained in the Philippine Islands by the United States during the previous twenty years came to an end. A popularly elective president replaced the governor general of the former regime. The legislative powers of the Commonwealth were first vested in a single national assembly of 120 members, but in 1940 the legislature became bicameral as a result of a constitutional amendment adopted by popular

THE NEW PHILIPPINE COMMONWEALTH.

referendum. The Commonwealth supreme court, consisting of seven justices, was authorized to declare laws unconstitutional by a two-thirds vote. Within two years after the inauguration of the Commonwealth, women were granted the ballot on equal terms with men. The Independence Act of 1934 also provided that the President of the United States should appoint a "high commissioner," but this official was given no powers of any considerable importance, his chief function being to keep the government at Washington informed as to developments in the islands.

Although the Filipinos thus assumed control of their government in all its branches, legislative, executive, and judicial, their freedom from American supervision (according to the terms of the Independence Act) was not to become complete until after the lapse of a ten-year probationary period, that is, until July 4, 1946. During that period the United States was to retain certain supervisory powers. In the first place, all amendments to the Philippine constitution and all laws relating to various important matters, such as the currency and emigration, in order to become effective, required the approval of the President of the United States. Under certain circumstances, moreover, the President was also empowered to suspend any law or executive order of the Philippine government. Second, all foreign relations of the Commonwealth during the ten-year period were to remain under the general jurisdiction of the United States. Third, the United States Supreme Court was to continue hearing appeals from the highest court of the islands; and fourth, the United States reserved the right to retain and garrison military and naval posts at its discretion. In addition to these specific reservations, it was provided that the United States might intervene at any time during the probationary period to preserve the government of the Commonwealth, to protect life, liberty, and property in the islands, or to enforce the fulfillment of the government's obligations. The Filipinos were also to continue temporarily in their allegiance to the United States and to continue their representation, through the medium of two resident commissioners, at Washington.

SPECIFIC RESERVED POWERS.

The Independence Act also contained important economic provisions. One of them placed a definite restriction upon the immigration of Filipinos to the United States. Another set a limit upon the quantity of certain island products, notably sugar, coconut oil, and cordage, which might come into the United States without payment of duty. Imports of these products in excess of such quotas were to pay regular customs duties. It was also stipulated that six years after the inauguration of the Commonwealth, that is in 1941,

TRADE RELATIONS.

a progressive export tax, beginning at five per cent, was to be levied upon goods shipped to the United States within the duty-free quotas, and the proceeds of this tax were to be used to liquidate the existing bonded debt of the islands. After the probationary period had expired, duty-free quotas were to be abolished, and thereafter all imports into the United States from the islands were to be subject to the regular tariff, unless a trade treaty is negotiated to make some different arrangement.

Somewhat more than half of the probationary period of the new Commonwealth had been completed when the Japanese invaded and occupied the islands in 1942. Following the invasion, the Filipino president and certain of his colleagues established a government-in-exile at Washington and continued a semblance of constitutional rule until the American reconquest of the islands in 1945 permitted their restoration. With that restoration effected, the assumption is that final steps will be taken to establish the Philippine Commonwealth as an independent state after conditions return to normal. Before independence can become complete, however, the Act of 1934 provides that the United States shall attempt to secure the consent of other powers to the "perpetual neutrality" of the islands. But it also provides that even thereafter the United States may, if it wishes, continue to maintain naval stations in the islands. These two provisions are hard to reconcile, for it is not likely that the United States will succeed in securing from other nations a guarantee of perpetual neutrality covering territory in which it maintains naval bases.

THE FINAL STEPS STILL TO BE TAKEN UNDER INDEPENDENCE ACT.

In any event, the final status of the Philippines, as the result of the war, may differ somewhat from what was contemplated in the Independence Act of 1934. The Filipinos will still desire independence, no doubt; like every other people they will want to be masters in their own political household and not even the benefit which they admittedly have derived from American tutelage is likely to lessen that desire. But the responsible Filipino leaders also realize that if their Commonwealth is set adrift in a world that has not established an ironclad guarantee of security for small nations, their independence might be short-lived. They have likewise some reason to be worried about the economic consequences of losing all preferential treatment for Philippine goods in the American market. It is not improbable, therefore, that there may eventually be a revision of the Independence Act such as will reconcile their ideal of an independent commonwealth with some arrangement which would justify the United States in continuing the role of a protecting power.

A POSSIBLE CHANGE OF ATTITUDE TOWARDS THE FUTURE OF THE PHILIPPINES.

THE DISTRICT OF COLUMBIA

The District of Columbia occupies a unique position in the governmental system of the United States. It is neither a state nor a territory, but by virtue of its being the national capital has been placed by the Constitution directly under the control of the federal government. From the beginning of the Revolutionary War to the formation of the Constitution, Philadelphia served as the continental headquarters save for short intervals when the city was occupied by the British (1777–1778) and again in 1783, when the congress of the confederation was driven from its meeting place by a band of Revolutionary soldiers clamoring for their pay. This latter incident carried its lesson to the members of the constitutional convention in 1787. While they were not ready to designate any city as the permanent seat of the new federal government, lest by so doing they might stir up sectional jealousy and perhaps lead to the rejection of the whole Constitution, they did make provision for the eventual selection of a capital which could be placed under the control and protection of the national authorities.[1]

EARLY VICISSITUDES OF THE FEDERAL CAPITAL.

At Madison's suggestion, accordingly, the Constitution was worded to provide that Congress should have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The selection of the exact place was left for the future, but with the stipulation, as indicated above, that the territory acquired for the new capital should pass outside the jurisdiction of any state.

WHAT THE CONSTITUTION PROVIDES.

When the first Congress of the United States met in 1789, after the adoption of the Constitution, there was a long and bitter struggle on this question, particularly between representatives of the northern and the southern states. Each wanted the capital located in its own region. In the end it was agreed to accept a location on the Potomac, which was in reality a victory for the South. The selection resulted from a deal between the sectional leaders and was connected with the proposition to have the new national government assume the debts which the several states had accumulated during the struggle for independence. At any rate, the District of Columbia became federal territory and the seat of government was moved there in 1800.

CHOICE OF THE POTOMAC LOCATION.

[1] Article I, Section 8.

For a time the District was permitted to have its own system of local government, with officials elected by the inhabitants, but there was so much extravagance and inefficiency that Congress ultimately decided to intervene, which it did with a drastic hand by abolishing local self-government within the District and providing that the area should be administered by an appointive commission.

The administration of the District of Columbia is vested, therefore, in a board of three commissioners. Two of them are appointed by the President, with the consent of the Senate, from among the residents of the District. They hold office for a three-year term, and one must be chosen from each of the two leading political parties. The third commissioner is detailed by the President from the engineer corps of the United States army. He must be an officer with the rank of captain or higher, but is not detailed for any definite term. Subordinate officers of the engineer corps are assigned to assist him.

PRESENT ADMINISTRATION: THE COMMISSIONERS.

These three commissioners of the District of Columbia, as a body, have large powers. They make all municipal appointments, supervise the local public services such as streets, water supply, police and fire protection, and have power to make the ordinances or regulations relating to the protection of life, health, and property. Each member of the commission takes immediate charge of certain departments; for example, the engineer member has charge of streets, water supply, sewerage, parks, and lighting. In a word, they exercise the functions which in many cities of the United States are given to the mayor, the heads of municipal departments, and the city council. The school system, however, is managed by a board of education, the members of which are appointed by the judges of the supreme court of the District of Columbia.

THEIR POWERS.

The laws applying to the District of Columbia are practically all made by Congress, although usually on the commission's recommendation.[1] So, also, are the appropriations for carrying on the government of the District. The commissioners each year prepare their estimates of what is required and submit them to a congressional committee. After this committee has considered the figures, and changed them as it sees fit, an appropriation act embodying them is passed by Congress. A share of the annual cost of governing the District, as thus appropriated, is paid from the national treasury; the remainder is levied upon the District by

THE LAWS AND THE APPROPRIATIONS, HOW MADE.

[1] Congress devotes the second and fourth Monday of each month, during its session, to District of Columbia affairs.

taxation.[1] A large amount of property in the District belongs to the national government and is exempt from taxation. That is why the national treasury bears part of the cost.

ABSENCE OF LOCAL AUTONOMY.

The legal residents of the District of Columbia are entirely disfranchised. They have no vote for President, since the District is not entitled to any presidential electors. They have no senators, no representatives in Congress, no mayor, aldermen, or councilors. The only way in which any inhabitant of the District of Columbia ever manages to cast a ballot is by being a legal resident of some other place. That is the way many of them arrange it. When men are appointed to federal positions which involve their living in Washington, they often retain their legal residences in the states from which they come, and go back to these states to cast their votes on election day. In some cases they are permitted to vote by mail. But there are many thousands who are domiciled in Washington and have no such opportunity. They pay taxes regularly but they have no representation either in the national government or in the management of their own local affairs. The government of the District of Columbia thus affords a striking illustration of how the American people manage to maltreat one of their traditional axioms: namely, that there should be "no taxation without representation."

THE ANOMALY OF THE SITUATION.

EFFICIENCY OF THE DISTRICT'S GOVERNMENT.

But, as a practical matter, the people of the District are better off than they would be if Congress allowed them to elect their local officers and to pay all their own municipal expenses. Their wishes are consulted through an advisory council of citizens. Public hearings are held on all proposals of any importance. Washington is a well-governed city, in fact it is probably the best governed of the world's capitals. Its administration has been free from serious scandal or corruption for more than sixty years. Local self-government would increase the municipal tax rate and the people of the District would probably get less for their money than they do under the present system.

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CHAPTER XXXIV

THE JUDICIAL SYSTEM OF THE UNITED STATES

Laws are a dead letter without courts to expound and define their true meaning and operation. — *Alexander Hamilton.*

In order to function successfully a federal system of government, such as exists in the United States, must have a strong judiciary. It must have courts which are able to command the obedience of both governments and people. For federalism, by its very nature, implies a division of authority between the nation and the states, with the certainty that disputes concerning the range of their respective powers will arise. Only a strong judiciary can settle such controversies promptly and decisively. Accordingly, the framers of the Constitution devoted the entire third article of that document to carefully worded provisions which set up a sphere of jurisdiction for the federal courts and established a Supreme Court with powers of final decision. Their wisdom is demonstrated by the way in which this court of last resort has guided American constitutional progress. The development of the United States Supreme Court into a final arbiter of constitutional disputes is one of America's most important contributions to the science of government.

THE NEED OF A STRONG JUDICIARY.

The frugal use of words and the clarity of diction which distinguishes the handiwork of those who made the Constitution is nowhere more evident than in this Article III. Lord Bryce tells of an educated Englishman who heard that the Supreme Court of the United States had authority to override the laws of Congress and spent two hours reading up and down the Constitution in a hunt for that particular provision. It is not surprising that his quest proved vain, for the Constitution has nothing to say on this point. Indeed it has very little to say about how the federal judiciary should be organized or what its procedure should be. It provides for a Supreme Court, but leaves the organization of that tribunal entirely to Congress. Likewise, it protects the judges against improper removal and guarantees that their salaries

WHAT THE CONSTITUTION PROVIDES.

shall not be reduced. But it is eloquent in its silences concerning functions and duties of these judges. This was not because the makers of the Constitution failed to recognize the importance of such matters. They were well aware of it. But they were of different minds as to whether any federal courts other than a Supreme Court ought to be established, and if so, how such courts should be organized. So they wisely contented themselves by providing that the judicial power of the United States should be vested in a Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish."

WHY FEDERAL COURTS WERE DEEMED NECESSARY.

Although it is clear, after a century and a half of experience, that the makers of the Constitution acted with wisdom in making possible the creation of a separate and independent national judiciary, the question may well be asked why they were so insistent on this point. There were plenty of state courts already in existence and all judicial controversies might have been left to them. That is what had been done under the confederation before the Constitution was framed. But that is exactly why they were so anxious to do something different. The old arrangement had proved unsatisfactory to every one, and its continuance under the new government would undoubtedly have proven more so. For disputes between the states would probably become more frequent in the future and an impartial umpire, standing outside them all, would be needed to settle these controversies. Likewise, the makers of the Constitution realized that there would be questions bearing on the relations of the United States with foreign nations, on matters covered by treaties, for instance, which could not safely be left to the state courts. To leave them there would have meant placing the reputation and the peace of the whole Union at the mercy of thirteen conflicting authorities. Controversies were also bound to keep arising between citizens of different states, and experience had disclosed the all too frequent tendency of state courts to favor their own citizens.

1. TO DECIDE CERTAIN CONTROVERSIES.

2. TO SECURE A UNIFORM INTERPRETATION OF THE NATIONAL LAWS.

But most important of all, disputes were certain to develop as to the meaning of various provisions in the new Constitution and also with respect to the interpretation of laws passed by Congress. By whom should disputes be decided? To leave them to the various state courts would be to invite chaos. Each might render a different decision, so that the Constitution and the federal laws would mean one thing here and another thing there. The makers of the Constitution decided, there-

fore, that there would have to be at least one coordinating tribunal, a distinctively federal court, supreme, and independent of the states.

> If there are such things as political axioms [wrote Alexander Hamilton], the propriety of the judicial power of a government being coextensive with its legislative, must rank among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question . . . Any other plan would be contrary to reason, to precedent, and to decorum . . . All nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

These reasons, however, did not necessitate the creation of a whole ladder of federal courts. One Supreme Court would have sufficed to maintain federal supremacy and to ensure the uniform interpretation of the laws, leaving to the state courts the function of hearing all cases in the first instance. And indeed, as already indicated, the Constitution does not require that there must be any other federal courts than the Supreme Court. It leaves that matter to the judgment of Congress. Might it not have been possible, then, for Congress to have refrained from establishing subordinate federal courts and to have empowered the state courts to take cognizance of cases falling within the judicial power of the national government? Some of those who helped frame the Constitution apparently thought so. Hamilton pointed out that the power "to constitute tribunals inferior to the Supreme Court" was "intended to enable the national government to constitute or *authorize* in each state or district of the United States a tribunal competent to the determination of matters of national jurisdiction within its limits." [1]

WERE TWO COMPLETE SETS OF COURTS NEEDED?

HAMILTON'S VIEW.

But Madison thought differently. He believed that unless lower federal courts were established throughout the Union with a certain amount of final jurisdiction there would be a multiplication of appeals from verdicts in the state courts. At any rate, Congress decided that it would be better for the new national government to have its own courts from the lowest to the highest, and, on the whole, this decision has never been regretted since. It was also the safest course because the Supreme Court subsequently decided that Congress had no power to confer jurisdiction on any courts not created by itself.[2] But with respect to those lower courts which Congress does establish, its

MADISON'S VIEW.

[1] *The Federalist*, No. 81. The word "authorize" is italicized in Hamilton's article.

[2] Houston *v.* Moore, 5 Wheaton 1.

powers are extensive. It may give or take away jurisdiction, determine the number of judges, control the procedure, or even abolish a court altogether.[1]

FEDERAL JURISDICTION

Before the structure and powers of the various federal courts are explained, it may be well to notice the division of jurisdiction between the federal courts, taken as a whole, and the state courts. The federal courts have jurisdiction over certain classes of controversies named in the Constitution; the state courts have jurisdiction over all others. And the cases over which the federal courts have jurisdiction cannot be more concisely summarized than by quoting the words of the Constitution itself:

THE SPHERE OF THE FEDERAL COURTS.

> The judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.[2]

As a model of concise legal phraseology, this paragraph is probably unsurpassed in the whole range of constitutional literature. If anyone has doubts on this score, let him try to recast the paragraph in his own words. But the very compactness of the wording makes some explanation necessary in order that the full force and effect of these provisions may be properly understood.

First is the reference to cases arising under the Constitution and under the laws or treaties of the United States. What does this mean? It means, to begin with, that only cases of a *justiciable* character can come before the courts. The judiciary cannot decide executive or legislative questions. For example, the courts will not pass upon the question whether a foreign government is entitled to recognition by the United States, or whether the United States is at war with another country. These questions are for the executive branch of the government to determine. But the provision also means that whenever a controversy involves the interpretation of a provision in the national

1. CASES ARISING UNDER THE FEDERAL CONSTITUTION, LAWS, AND TREATIES.

[1] When Congress abolished the federal circuit courts in 1911, the judges were retained as members of the circuit court of appeals, thus protecting their constitutional tenure.

[2] Article III, Section 2.

Constitution, or in a federal law, or in a treaty to which the United States is a party, the issue is one which, subject to the regulations which Congress prescribes, falls within the jurisdiction of the federal courts. Anyone who claims a right under the Constitution, laws, or treaties of the United States may ultimately claim it in an action beginning in those courts or on appeal from a state court. The situation is well summed up in this statement of the Supreme Court:

> The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily inspired by and under the Constitution and laws of the United States. [But the right must be a substantial and not merely an incidental one in order to warrant its assertion in the federal courts.] It must appear on the record . . . that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained.

SOME ILLUSTRATIONS.

To take some illustrations: if persons or corporations are being prosecuted in any state court on grounds which seem to infringe on any substantial right guaranteed to them by the federal Constitution (for instance, the right not to be deprived of life, liberty, or property without due process of law), they may seek relief by having the case carried to the federal courts. Or if any law made by Congress is being applied, controversies relating to it may come to the federal courts. Or, again, if a foreign citizen claims that rights given to him by treaty are denied by any state of the Union, he may come to the federal courts for the enforcement of his claim. Whenever, in fact, one of the parties to a controversy asserts that he has a substantial right which arises from the national Constitution, laws, or treaties, this brings the matter within the judicial power of the United States and potentially within the jurisdiction of the United States courts.

2. CASES AFFECTING AMBASSADORS, OTHER PUBLIC MINISTERS, AND CONSULS.

Again, the judicial power of the national government extends to all cases affecting foreign diplomats. A diplomatic agent of a foreign state is by international law immune from prosecution in the courts of the country to which he is accredited. This provision of the Constitution merely operates, therefore, to keep the state courts from a possible infringement of international law. If an ambassador or other public minister of a foreign state commits an offense, his recall may be requested, or he may even be expelled; but as long as he remains an accredited diplomat, his freedom from legal process is guaranteed. This rule as to diplomatic immunity has been recognized from ancient times.

By "admiralty and maritime" jurisdiction is meant authority over cases which relate to American vessels traveling on the high seas or in the navigable waters of the United States. Such, for example, are controversies regarding freight charges, seamen's wages, damages due to collisions, and marine insurance. In time of war it also covers cases relating to prize vessels captured at sea. Admiralty law is a distinct branch of jurisprudence, differing both in substance and in procedure from the common law and equity of the regular courts. For that reason, and also because foreign commerce was placed within the regulating power of the national government, it was deemed wise to vest admiralty jurisdiction in the federal courts.

3. ADMIRALTY CASES.

Likewise, the federal courts have jurisdiction whenever the United States is one of the parties to a suit, either plaintiff or defendant, or whenever the controversy is between two states of the Union, or between "a state and a citizen of another state." The first two clauses of the foregoing sentence are perfectly clear and have caused no difficulty, but the third (the one in quotation marks) is ambiguous. Does it mean that a state of the Union may be sued in the federal courts by a citizen of some other state? Does it mean, for example, that if you are a citizen of New York you can sue the Commonwealth of Kentucky in the federal courts?

4. CASES IN WHICH THE UNITED STATES OR A STATE OF THE UNION IS A PARTY.

A dispute on this point arose soon after the Constitution went into effect, and in a noteworthy decision the Supreme Court ruled that such suits might be maintained.[1] The sovereign state of Georgia, it held, could be sued in the federal courts by a citizen of South Carolina. This ruling was a surprise, because it had been openly asserted, when the Constitution was before the states for acceptance, that no state would be amenable to the suit of an individual without its own consent. But the Supreme Court, in making its adjudication, followed the literal wording of the Constitution, which plainly allows such a construction.

THE SUABILITY OF A STATE.

Georgia thereupon set up a loud wail of protest, and the other states joined her. They denounced the decision as an impairment of their sovereignty and an affront to their dignity. Of course, the states had good grounds for this protest, inasmuch as the principle that a sovereign state is not liable to be sued without its own consent had been recognized from time immemorial. Blackstone spoke of it as "a necessary and fundamental principle." So the states demanded that the Constitution be amended in such way as to

THE GEORGIA CASE.

[1] Chisholm *v.* Georgia, 2 Dallas 419 (1793).

make this principle clear, and in 1798 the eleventh amendment set the matter right.

THE ELEVENTH AMENDMENT.

By the terms of this amendment the federal courts are expressly forbidden to take cognizance of any suit brought against a state "by a citizen of another state, or by citizens or subjects of any foreign state." Anyone who desires to sue a state must bring his suit in the state's own courts, and these courts will not entertain such suits unless thay have been authorized to do so, in other words, unless the state legislature has consented. The states do, as a matter of fact, permit themselves to be sued in their own courts under prescribed conditions. But a state may be sued in the federal courts only by the United States, or by a foreign state, or by another state of the Union.

MAY STATE OFFICIALS BE SUED IN THE FEDERAL COURTS?

While the doctrine that no state may be sued in the federal courts by its own citizens, or by citizens of another state, or by foreign citizens is now well established, the question of whether the officials of a state are equally immune is by no means so clear. In general, the Supreme Court has endeavored to determine whether the suit is really against the state through one of its officers, or whether it is against a state officer as an individual. In the former case it will not assume jurisdiction; in the latter it has maintained its right to entertain suits against those who, "while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs under color of authority."

5. CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES.

Finally, the jurisdiction of the federal courts extends to controversies between foreigners and American citizens, and between citizens of different states. Cases of this sort bring the largest grist to the federal mills. A corporation or company is presumed, for purposes of jurisdiction, to be a citizen of the state in which it was chartered or incorporated, although it may be doing the larger part of its business in other states. Thus, a company chartered in New Jersey is for judicial purposes deemed to be a "citizen" of New Jersey. When a corporation brings a suit, or a suit is brought against a corporation, the chances are, therefore, that the two suitors will be of diverse citizenship. But diversity of citizenship does not of itself entail the bringing of a suit in the federal courts, for the national laws provide that all such cases shall be left to the state courts if no question of federal right is involved and if the amount in controversy does not exceed a certain sum. This action has been necessary to protect the federal courts from being overwhelmed by a flood of trivial suits between litigants of different state citizenship.

When the Constitution provides, therefore, that the judicial power of

the United States shall extend to various classes of controversies, it does not mean that the federal courts must assume *exclusive* jurisdiction in all such cases. Congress determines how far the exclusive jurisdiction shall extend; it may give to the federal courts the whole field or only a part of it. Congress has, of course, given the federal courts exclusive jurisdiction over all cases of crime against the United States. It has also given the federal courts exclusive jurisdiction in all suits to which the United States is a party, all suits between two states, all suits between a state and a foreign nation, and certain civil suits arising under the national laws. In all other cases the state courts have been permitted by Congress to assume concurrent jurisdiction. That is, the plaintiff in a suit has the option of commencing it in a federal court, or in the courts of his own state, or in the courts of a state where the defendant resides. This option is subject, however, to the limitations mentioned toward the end of the preceding paragraph.

FEDERAL JURISDICTION IS NOT ALWAYS EXCLUSIVE.

Let no one imagine, then, that the sinuous line which marks off the jurisdiction of the federal courts is easy to follow. The division of jurisdiction between the two sets of courts is, in fact, so indistinct at some points that even good lawyers are not always sure of their ground. As for the ordinary layman, he is often quite bewildered by the strange things which result from the divided judicial authority. An employee of a national bank embezzles a sum of money; he is arrested by a United States marshal, prosecuted by a federal district attorney, tried in a federal court, sentenced to a term in a federal penitentiary, and then pardoned by the President of the United States before his term is out. Directly across the street an employee of a state bank or trust company embezzles the same amount; but he is tried in a state court, given a different sentence, sent to a state prison, and applies to the governor for a pardon. This seems quite inexplicable to the man in the street, but the simple explanation is that both the nation and the states have an equal right, through their own officials, courts, and penal institutions, to administer and enforce their own laws.

DIFFICULTIES ON THE SUBJECT.

By way of summary, therefore, it may be stated that every proceeding which appears on the docket of a federal court has been placed there for one of two reasons. In the first place, it may be there because it raises a "federal question," that is, some issue that involves the Constitution, laws, or treaties of the United States. If such an issue is involved, the proceeding may come to the federal courts no matter who the contending parties may be. But in the second place, a proceeding

SUMMARY.

may be brought into the federal courts, irrespective of the issue, by reason of the status of the parties: for example, because it is a suit between two states, or because the individual suitors are citizens of different states. Either of these circumstances can bring a matter into the federal courts, but it must be one of the two. At the same time, it is also well to recall that the precise extent to which such questions do fall within the jurisdiction of a particular federal court is a matter almost wholly within the discretion of Congress. It is Congress which determines which of the issues coming within the judicial power of the United States shall fall within the jurisdiction of any grade of federal courts; and it is Congress, furthermore, which determines whether that jurisdiction shall be original, that is, jurisdiction in the first instance, or appellate, that is, jurisdiction over questions of law in controversies originally decided by a lower federal court or by a state court.[1]

LAW AND EQUITY

So much for the general jurisdiction of the federal courts. What jurisprudence do they administer? They administer both law and equity.

THE LAW AND EQUITY OF THE UNITED STATES.

Law, speaking broadly, is made up of two branches, the common law and statutes.[2] The development of the common law began in mediaeval England when there were few written rules. In those early days the royal courts decided cases, as far as they could, in accordance with the usages or customs of the people. Gradually, however, the decisions of the courts in such matters grew more and more uniform, until this judge-made law or body of usages became "common" to the whole realm of England, although it had never been enacted as law by any parliament or other lawmaking body.

THE TWO BRANCHES OF LAW: 1. THE COMMON LAW.

ITS HISTORY IN ENGLAND.

But it is not to be assumed that the common law stood unstirred and changeless on its mediaeval pedestal. Developing in accordance with the needs of each successive generation, it broadened out from precedent to precedent, thus adapting itself to the genius of the Anglo-Saxon race. In the course of time, moreover, this system of common law was reduced to written form by various great

[1] Except the original jurisdiction of the United States Supreme Court, which is definitely fixed by the Constitution.

[2] Occasionally they also administer "admiralty law," a code of maritime rules inherited from England which has been considerably modified by acts of Congress, and they also apply the rules of international law when the need arises. See Charles Pergler, *Judicial Interpretation of International Law in the United States* (New York, 1928).

text writers or commentators, Glanvil, Bracton, Littleton, Coke, and Blackstone.

During the colonial period the common law followed the flag across the Atlantic. Its principles and procedure were applied by the judges in the American colonies. The Declaration of Rights, adopted by the First Continental Congress in 1774, spoke of it as a heritage. "The respective colonies," it asserted, "are entitled to the common law of England." When the thirteen colonies shook off British political control, therefore, they did not root out the common law. On the contrary, they retained it; and it still persists as the foundation of the legal system in the nation and in all the states but one. Only in Louisiana did the common law fail to secure an initial foothold. There, through the colonization of the country by the French, the jurisprudence of France became the basis of the present legal system. Even in Louisiana, however, trial by jury and other common law institutions have been superimposed upon the old legal framework and have greatly modified it.

ITS TRANSPLANTATION TO AMERICA.

So, although the common law of England remains the basis of the American legal system, it has ever kept growing and changing, widening, and narrowing in the New World as in the Old. This steady transformation of the American legal system has been accomplished in part by judicial decisions but in larger measure by the enactment of statutes which have modified or even supplanted the rules of common law on many matters. A statute or act of a legislature may merely reenact with slight changes what has been the common law, or it may set some rule of the common law aside. Where the common law and a statute are inconsistent, the statute prevails. "Reason is the life of the law," said Coke, and when any rule of the common law seems unreasonable or out-of-date the legislature intervenes to supplement, or modify, or supplant it by statutory law.

ITS DEVELOPMENT THERE.

Statutory law, as distinguished from common law, is law made by some regular lawmaking body. By far the greater part of statutory law is made by Congress, by the state legislatures, and by municipal councils. It includes what are popularly known as laws, acts, statutes, and ordinances.[1] Most of these enactments deal with matters which the common law does not cover at all — with things that require legal regulation because of the complexities of our modern social and economic life. Because of this increasing com-

2. STATUTORY LAW: WHAT IT IS.

[1] The terms "laws, acts, and statutes" are usually confined to the enactments of Congress and the state legislatures, while the term "ordinances" is used to designate the enactments of municipal councils and other subordinate lawmaking bodies. In towns and townships they are often called "by-laws."

plexity the production of statutory law by Congress, by the forty-eight state legislatures, and by the thousands of subordinate lawmaking bodies, has developed to enormous proportions, and it keeps increasing year by year.

ITS SCOPE AND IMPORTANCE.

Accordingly, this branch of law now forms by far the larger part of American jurisprudence as a whole, but its importance is not commensurate with its bulk. These thousands of statutes have supplemented the common law, filled in the gaps, and altered it at times; but they have not made it cease to be an underlying force in the legal system of the country. No lawyer is a well-trained lawyer unless he has mastered the principles of the common law. In the law schools it is common law, for the most part, that teachers teach and students study. Some states have enacted comprehensive codes of law (a criminal code, a civil code, a code of procedure, etc.) which ostensibly supersede the common law, but even in these "code states" a great deal of common law remains operative. For it is the rule in such states that where the codes fail to cover a matter, the common law applies, and this leaves a lot of work for the common law to do.

SUPERIORITY OF THE COMMON LAW.

The common law is an old standby; it has done valiant service for many centuries. But it tends to lag behind the needs of the time. Lawyers and judges are inclined to look upon legal principles as fixed and absolute. When new situations arise, they try to meet them by merely stretching the old legal formulas. This is a slow method of development and the people become impatient with it. They call on Congress and the legislatures to hurry the process by passing some new and drastic statute which is sometimes poorly thought out and hence works badly. Nothing is easier to make than an unworkable statute, and nothing is harder than to execute it. The art of government is largely the trick of adapting laws to the foibles of mankind. Time and circumstance can usually perform that trick more deftly than the self-confident politicians of a legislature. "Common law is common sense," runs an old saying. A good deal of our statutory law is not.

EQUITY: WHAT IT IS.

The Constitution speaks of the federal courts as being entitled to jurisdiction "in law and equity." What is equity? To explain the substance, procedure, and limitations of equity jurisprudence would take far more space than can be accorded to that subject in any general book on American government. The layman thinks of "equity" as something associated with abstract justice or the conscience of the court. Many people have an idea that a judge gets his law out of a book and his equity out of a soft heart. Of course

there is no basis for this idea. Equity comes out of books just as the law does. It embodies a formal set of rules which must be applied by the court with an unfaltering hand, even as laws are applied, and with very little room for the play of a judicial conscience. It is merely a special branch of the law.

ITS ORIGIN.

The origins of equity are interesting. In mediaeval England there grew up, side by side with the common law, a system of rules administered by a special royal court, the court of chancery, which aimed to give redress to individuals in cases where the common law afforded such redress inadequately or not at all. Suitors who felt that they could not get justice in the regular law courts petitioned the king, as the fountainhead of justice, to intervene on their behalf. Being busy with other things, the king referred these petitions to his chancellor, who soon built up a court for considering them. This court of chancery became the "keeper of the king's conscience," and its intervention at the outset was confined to granting relief from the legal consequences of accident or mistake. Every such case was adjudged on its own merits. Gradually, however, definite principles or rules were evolved to cover all cases of the same sort. In the course of time these rules were reduced to written form; and taken together they became known as equity.

ITS DEVELOPMENT.

ITS NATURE.

Equity came to the American colonies with the common law. It was retained after the Revolution and has been developed. Today, both law and equity are usually administered by the same courts. The differences between the two are numerous and technical, but in general equity applies only to certain classes of civil actions and never to criminal cases; its procedure is simpler; a jury is not ordinarily used to determine the facts at issue, and its remedies are more direct. A suit at law, for example, is a request for an award of damages; a petition in equity usually asks for a decree or for an injunction, that is, for an order specifically authorizing or compelling a person to do or not to do a thing. Over some matters equity has exclusive jurisdiction; over others its jurisdiction is concurrent with that of the law. Equity is commonly used as a means of preventive justice, that is, to secure a stay of action before an injury is done.

ALL BRANCHES OF LAW ARE ADMINISTERED BY THE SAME COURTS.

As already pointed out, the federal courts, within the fields of jurisdiction allotted to them by Congress, administer common and statutory law, equity, and admiralty and maritime law. But to get a clearer idea as to when and how such jurisprudence is applied, it is necessary to consider briefly the two kinds of legal proceedings which come up

in the courts. These are: first, criminal proceedings or prosecutions of individuals or organizations by the government, and, second, civil suits or actions in which the litigants are private parties, or, sometimes, a governmental unit and a private party.

CRIMES AGAINST THE FEDERAL GOVERNMENT.

Although criminal offenses, as defined by the common law, are still the subject of prosecutions in the states, the Supreme Court long ago decided that there could be no common-law crimes against the federal government. Hence, the criminal jurisdiction of federal courts is based exclusively on the federal Constitution and statutes. Crimes defined by federal statutes are fairly numerous, and they are becoming more so, because when Congress enacts a law it may (and frequently does) provide that any violation shall constitute a criminal offense. Thus crimes against the United States may result from violations of the laws or regulations relating to interstate commerce, the use of the mails, the management of national banks, the drafting of men into the armed forces, etc. Congress also has power to provide for the punishment of offenses committed on the high seas as well as in the navigable waters of the United States. In recent years it has added kidnapping and the theft of certain property to the list of federal crimes when such activities involve transportation across state boundaries.

CIVIL CASES IN FEDERAL COURTS.

But the federal courts deal mainly with civil rather than criminal cases. Some civil controversies arise out of commerce on the high seas or in the navigable waters of the United States. Here the federal courts apply the rules of admiralty and maritime law, as established by earlier judicial decisions or enacted by Congress. Most of the civil actions which come up in the federal courts, however, are those in which federal jurisdiction results from the status of the parties concerned. Such are those cases in which the United States, two or more states, or a state and a foreign country or its citizens are parties to the suit, and especially where the suitors are citizens of different states of the United States. Controversies of this last-named class, arising out of the diverse citizenship of the litigants, include almost every conceivable type of legal action. They may be suits in equity in which the petitioner asks the court to issue an injunction against somebody (who then becomes known as the respondent), or requests the court to grant him some other equitable remedy. Or they may be suits at law in which the plaintiff asks for an award of damages against somebody (who then becomes known as the defendant). In cases where equitable remedies are sought, the federal courts have always exercised considerable discretion in modifying the traditional rules of equity, and in this way have

built up a special body of equity jurisprudence differing in some respects from that which exists in most of the states. In civil cases requiring the application of the rules of the common law, the federal courts now apply the common law or statute law of the state in which the cause of the suit occurred.

JUDICIAL PROCEDURE

The Constitution leaves the procedure of federal courts to the discretion of Congress. This procedure includes the rules of evidence, the methods of selecting jurors, the taking of appeals, and all such matters relating to the actual work of trying cases. To some extent these rules of procedure are established by the Judiciary Act of 1789 and by the various amendments to that statute, all of which were revised and codified by a general law in 1911. At various times in the past, Congress has also empowered the Supreme Court to make rules of civil procedure for the lower federal courts; and in 1942 that tribunal set up a permanent advisory committee of experts to advise it on amendments and additions to these rules. Since 1940, moreover, the Supreme Court has been authorized by Congress to prescribe rules of criminal procedure for use in the federal district courts, and a special advisory committee has likewise been set up to assist the court in this task.

CONGRESS CONTROLS PROCEDURE IN FEDERAL COURTS.

The Constitution, however, contains many limitations upon the power of Congress and the courts to fix rules of procedure, especially in criminal cases. These limitations, found chiefly in the Bill of Rights (that is, in the first ten amendments), are designed to ensure fair trials and to preclude injustice to any of the parties involved in a criminal case. They relate to such matters as grand jury hearings and indictments, jury trials, promptness and publicity in judicial proceedings, second jeopardy, self-incrimination, the issue of search warrants, and the nature of punishments. The limitations apply only to the procedure of the federal courts; they do not govern the procedure of state tribunals. But this is not a matter of much practical consequence because each state constitution places similar limitations on the procedure of its own state courts. In recent years, moreover, the "due process" and "equal protection" clauses of the fourteenth amendment, which do apply to the states, have been interpreted by the United States Supreme Court to require certain procedural safeguards in the state courts.[1]

BUT SUBJECT TO VARIOUS LIMITATIONS.

[1] For example, in the so-called Scottsboro cases, in which Negroes had been indicted and convicted in the Alabama courts for a statutory offense, the United States Supreme Court

Among the procedural limitations imposed by the Bill of Rights and applicable to federal courts, one of the more important is the provision that no one may be held for any "capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." [1] A grand jury is a body of citizens, not exceeding twenty-three in number, selected by lot or by some other established procedure, and sworn to discharge impartially the duty of investigating all alleged offenses which may be brought to their attention by the prosecuting officers of the government. In other words, the grand jury (aided by the district attorney or prosecuting attorney) conducts an investigation, not a trial. Witnesses are summoned before it and sworn, but no defense is presented and no counsel for the accused has any right to appear before a grand jury, although such a privilege may be allowed. If the grand jury finds that there is a prima facie case against any person, it returns a "true bill," or indictment, against him and he is held for trial. If, on the other hand, it finds no reasonable ground for holding the suspected person for trial, it returns "no bill," and he is discharged. A grand jury may undertake investigations on its own initiative, and occasionally it does conduct an inquiry into the actions of some public officer or the conditions existing in some public institution.

NATURE OF THESE LIMITATIONS.

1. THE NEED OF GRAND JURY ACTION. WHAT THE GRAND JURY IS AND DOES.

In all criminal cases (except impeachments) and in all civil suits at common law, where the amount involved is more than twenty dollars, the national Constitution requires that trials in the federal courts shall be by jury.[2] This jury, in criminal cases, must be selected from the state or district in which the crime is alleged to have been committed. If the offense is committed outside the limits of any state, the trial may be held and the jury selected wherever Congress shall by law direct. And no question of fact (as distinguished from a question of law), when tried and determined by a jury, may be retried in any higher court except by the same method. No higher court, sitting without a jury, can ordinarily set aside any

2. THE REQUIREMENT OF JURY TRIAL.

upset a conviction on the ground that the lower courts had made inadequate provision for counsel for the accused and invalidated an indictment because the county in which the indictment had been returned had failed for more than a generation to summon qualified Negroes for grand jury service. Powell *v.* Alabama, 287 U. S. 45 (1932), and Norris *v.* Alabama, 294 U. S. 587 (1935).

[1] Amendment VI. An "otherwise infamous crime" has been construed to be one to which a penalty of imprisonment for more than one year is attached. The Constitution makes an exception to the requirement of a grand jury indictment in the case of persons serving in the military and naval forces of the United States. The distinction between presentment and indictment is no longer of any practical importance.

[2] The constitutional right to a jury trial in criminal cases does not extend to certain misdemeanors and it may sometimes be waived by the accused in the case of felonies.

conclusions of fact reached by a jury in a lower court. But it can send the case back for a new trial, thus ordering a redetermination of the facts by a new jury. The Supreme Court of the United States, for example, sits without a jury. Consequently, it hears arguments on disputed points of law only; it does not hear witnesses or listen to the arguments of counsel concerning the facts of the case. Finally, the term "trial by jury," as used in the Constitution, means a jury trial in accordance with the rules of the common law. The right of trial by jury is guaranteed only to the extent that the common law has traditionally required it. Accordingly, there is no constitutional right to a jury trial in equity cases, or in cases involving contempt of court, or in cases where aliens have been ordered to be deported for illegal entry, etc. It is permissible, however, for Congress to provide for a jury trial in such cases if it sees fit, and it has provided for jury trials in cases of indirect contempt growing out of injunctions issued in labor troubles.

SCOPE OF THIS REQUIREMENT.

A trial jury is a body of twelve qualified persons, selected either by lot or in accordance with other legally established methods, and sworn to try impartially a particular case, rendering a true verdict thereon in accordance with the evidence. It is usually required that persons called for jury service shall be qualified voters, but there is no necessary connection between the right to vote and the obligation of jury service. It is merely that the voters' lists are commonly used in making up the roster of those called upon to serve. Certain classes are exempt by law from the obligation to serve on juries; the exemptions usually include physicians, attorneys, public officials, teachers, and persons in the military and naval service. Persons summoned to serve at each term of the court are known as veniremen, and they form a panel from which the twelve jurors are selected after due inquiry has been made concerning their impartiality and competence. The parties to the trial have the right to challenge any member of the panel for stated cause. The right to challenge peremptorily, that is, without assigning any cause, is also granted under certain limitations. The selection of the jury is complete when twelve persons, against whom no valid challenge has been interposed, are duly sworn and assigned to places in the jury box.

WHAT A TRIAL JURY IS AND DOES.

A trial jury hears such evidence as the presiding judge permits to be presented. The admissibility of evidence is a matter of law for the judge, not for the jury, to decide. But the value of the evidence, when once admitted, is a matter of fact for the jury to determine. Most suits at law resolve themselves into questions concerning the relative credibility of evidence submitted by the opposing

FUNCTIONS OF THE JURY.

sides. When the evidence has been presented and the arguments of counsel heard, the judge instructs or "charges" the jury on their legal duties and on points of law; and, in the federal district courts, he may also give his own opinion as to the weight of the evidence on any matter in controversy. This last point deserves emphasis because, in many of the state courts, a judge is not permitted to make any comment on the weight of the evidence.

THE VERDICT.

Jury verdicts in the federal courts must be unanimous.[1] If the jury fails to reach unanimity after prolonged deliberation in any criminal case, it reports a disagreement and is discharged. Then the case has to be tried all over again, unless the federal prosecutor decides that there is no likelihood of a conviction and consequently drops the case. This the prosecution has a right to do with the approval of the court. A presiding judge may set aside a unanimous verdict, other than a verdict of acquittal, if he finds that the jury has disregarded his rulings on points of law, or if he is satisfied that the verdict is clearly against the weight of the evidence, or if there has been any serious irregularity in the methods by which the jurors have reached their verdict. In such cases, the presiding judge cannot himself render a different verdict, but merely orders a new trial.

3. OTHER SECURITIES FOR FAIR TRIALS.

Certain other essentials of procedure in the federal courts are prescribed by the Constitution. It is required that trials shall be speedy and public; that a person charged with crime shall be informed of the nature of the accusation; that he shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor; and that no person in any criminal case shall be compelled to be a witness against himself. Finally, an accused person is entitled to have the assistance of counsel in his defense. Excessive bail must not be required, nor cruel and unusual punishments inflicted. In searching for evidence, no warrant may be issued, except upon probable cause supported by oath and definitely describing the place to be searched or the persons to be arrested.[2] All these requirements are imposed by the supreme law of the land, and Congress has no power to set any of them aside. But they apply to the administration of justice in the federal courts only and have no relation to the procedure of the state courts, except insofar as they have been copied into the state constitutions, or except to the extent that

[1] In some state courts a majority suffices to secure a verdict in civil trials. This reduces the likelihood of an indecisive trial.

[2] For a detailed discussion of these various judicial limitations, see John M. Mathews, *The American Constitutional System* (2nd edition, New York, 1940), Chaps. xxiii and xxvii.

infringements may involve a denial of "due process of law" under the national Constitution.

TWICE IN JEOPARDY.

The constitutional protection of all accused persons against "second jeopardy" requires a word of explanation. "No person," the Constitution provides, shall be subject "for the same offense to be twice put in jeopardy of life or limb." [1] The application of this rule is that when a person accused of crime has been tried in a federal court, and a verdict rendered, he cannot be tried again by any federal court for the same offense unless with his own consent. If the verdict is one of acquittal, it matters not that new evidence has been discovered; the first trial is conclusive and the matter cannot be reopened. When an accused person is acquitted, moreover, the government has no right of appeal to any higher court on the ground that the trial was not fairly conducted. But if an accused person is convicted, an appeal can usually be taken or an application for a new trial made on his behalf.

LIMITED SCOPE OF THE JEOPARDY RULE.

Instances arise occasionally in which the same act may be made the basis of two distinct accusations and trials, without placing a person twice in jeopardy, as, for example, the passing of counterfeit money, which is a statutory offense under the laws of the United States and is also a fraud under the laws of a state. Selling shares in a fraudulent enterprise is an offense against the laws of the states, and, if it is done in interstate commerce or through the mails, it is also an offense against the laws of the United States. Sometimes, moreover, a single act may involve two offenses in the same jurisdiction, as, for example, driving a car at an excessive speed and driving while intoxicated. In such cases, an acquittal on one charge is not a bar to trial on the other.

SIGNIFICANCE OF THESE LIMITATIONS.

The insertion of these various limitations in the Bill of Rights is an indication of the jealousy with which Americans, in the closing years of the eighteenth century, regarded the fundamental rights of the citizen. They were not satisfied with the national Constitution until these provisions had been added to it. They knew from experience in colonial times that legislatures and courts, as well as kings and governors, could become arbitrary and tyrannical. They desired to make certain that the citizen should have a square deal when brought to the bar of justice. Perhaps they went too far. They gave the offender more constitutional rights and privileges than he gets in any other country.

Although not falling within the category of constitutional limitations

[1] The archaic expression "life or limb" is now interpreted as "life or liberty."

on the procedure of the courts, mention may also be made here of the writ of habeas corpus, since its purpose is to give special protection to accused persons. Normally this writ may be issued by any regular court of competent jurisdiction, federal or state, by virtue of its inherent judicial authority as a common-law tribunal. A person held in custody or deprived of his liberty by anybody whatsoever (e.g., a jailer, a ship captain, a bailiff, etc.) may petition such a court for the writ. When issued, it is directed to the person or persons who hold the petitioner in custody and, according to its terms, the prisoner must be forthwith brought before the court and reasons given for his detention. If these reasons satisfy the court — for example, if there is prima facie evidence that the prisoner is being legally held and that the proper steps are being taken to bring him to trial, he may be returned to custody. If, on the other hand, the reasons for his detention are deemed unsatisfactory, the court will order the prisoner's release. Thus, the writ of habeas corpus is the primary procedure by which a person unjustly deprived of his liberty can promptly regain it, or by which an accused person can be assured of being brought to trial within a reasonable time. That is why the writ of habeas corpus has often been called the cornerstone of Anglo-American liberty.

THE WRIT OF HABEAS CORPUS.

The Constitution provides that the privilege of the writ of habeas corpus may be suspended in time of public emergency but does not indicate who may suspend it. During the Civil War, President Lincoln suspended it in various parts of the country on his own responsibility; and was widely criticized for doing so. Subsequently, the Supreme Court held that the President does not possess this power of suspension unless Congress authorizes him to exercise it.[1] The privileges of the writ may be denied under certain unusual circumstances. During the Second World War, seven Nazi saboteurs, who landed on American shores from a German submarine, were denied the privilege of the writ by the Supreme Court after they had been brought to trial before a military commission. This denial was apparently based on the idea that they were part of an invading enemy force, to whom the constitutional guarantees do not apply.

HOW THE PRIVILEGE OF THE WRIT MAY BE SUSPENDED OR DENIED.

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[1] *Ex parte* Milligan, 4 Wallace 2 (1866).

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See also the references at the close of the next chapter.

CHAPTER XXXV

THE SUPREME COURT AND THE OTHER FEDERAL COURTS

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been so frequently misunderstood as the duties assigned to the Supreme Court and the functions which it discharges as the ark of the constitution. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side. — *Lord Bryce.*

THE BASIS OF JUDICIAL ORGANIZATION.

The Constitution, as has been said, did not establish federal courts other than the Supreme Court, but merely provided that they might be set up by Congress. And Congress lost no time in taking advantage of its authority by enacting the Judiciary Act of 1789, a statute which, with its numerous amendments, still forms the basis of the federal hierarchy of courts. It provided for district courts, circuit courts, and a Supreme Court. There were thirteen district courts at the outset; now there are eighty-four.[1] There were three circuit courts; today there are ten circuit courts of appeals.[2] The Supreme Court, as originally set up by Congress, had a chief justice and five associate justices. The number of associate justices varied during the next eighty years, but in 1869 it was fixed at eight; and despite the determined effort made in the proposed court reorganization bill of 1937 to enlarge the number, the Supreme Court still consists of the chief justice and eight associate justices.

THE SUPREME COURT: HOW CONSTITUTED.

The chief justice of the United States and the associate justices of the Supreme Court are appointed by the President with the consent of the Senate to hold office during good behavior and cannot be removed except by impeachment. A member of the supreme bench may retire, if he wishes, when he reaches the age of seventy, or at any time thereafter; and, if he has served for a certain number of years, he can retire with full salary. The court meets in its

[1] This does not include four such courts in Alaska, Hawaii, Puerto Rico, and the Canal Zone.

[2] From 1891 to 1911 there were both circuit courts and circuit courts of appeals. In the latter year the circuit courts were abolished.

new and stately building at Washington and its sessions, which begin on the first Monday in October, usually terminate in June. It has its own reporter, marshal, and other officials, determines what members of the bar may practice before it, and establishes its own rules of procedure.

HOW ITS BUSINESS IS DONE.

In the course of each year the Supreme Court of the United States decides approximately a thousand cases. It meets every weekday except Saturday and its sittings, which usually begin at noon, are continued, save for a short recess, until about four-thirty. Six justices constitute a quorum. If the justices divide evenly on a case, it is customary to order a rehearing. Daily sittings are mainly devoted to the oral arguments of attorneys, who also file printed briefs for the justices to study. Each oral argument is ordinarily limited to one hour, and interruptions from the bench in the form of questions are not uncommon. On Saturday of each week the justices confer in their own private room upon the cases which have been argued. The various points presented to them in the oral arguments and in the printed briefs are discussed, and a decision is reached by majority vote. The chief justice then designates one of his associates to write the court's opinion in full, although sometimes he assigns the task to himself. When this has been prepared, there is a further discussion, with such changes in the wording as may be decided upon, and the document is then handed down to be printed as the decision of the court. It is made public at one of the court's Monday sessions. Any justice who does not agree with the majority of the court may write a dissenting opinion, or a minority of the justices may join in submitting a dissenting opinion. If a justice agrees with the decision of the majority, but does not agree with the reasons which they give for it, he may write a "concurring opinion." These decisions and opinions are printed in a series of Supreme Court *Reports*, which fill two or three volumes each year.[1]

HOW CASES MAY COME BEFORE IT:

I. BY ORIGINAL SUIT.

Cases may be brought before the Supreme Court in either of two ways, by original suit or by appeal. The original jurisdiction of the Supreme Court, that is the authority to hear cases in the first instance, is limited by the Constitution to cases involving ambassadors and other public ministers and cases to which a state is a party. Even this limited field may be shared by

[1] The official reports of the Supreme Court were published each year prior to 1874 under the name of the official reporter; since that date they have appeared as successive volumes of *United States Reports*, the first volume being numbered as volume 91. The names of these court reporters were as follows: Dallas (1790–1800); Cranch (1801–1815); Wheaton (1816–1827); Peters (1828–1843); Howard (1843–1860); Black (1861–1862); Wallace (1863–1874). Hence, the manner of citing Supreme Court decisions as 2 Dall. 191, or 7 Wheat. 64, or 230 U. S. 105, for example.

other tribunals, since Congress has stipulated that only in cases *against* ambassadors and other public ministers, and only in cases where, if a state is one of the parties, the other party is the United States, a foreign state, or a state of the Union, *must* action be begun in the nation's highest tribunal. When cases of this nature come to the Supreme Court, they are likely to be important, particularly cases between states; but they arise infrequently and contribute very little business to the tribunal's docket.

By far the larger part of the Supreme Court's jurisdiction is appellate; in other words, it is made up of cases which have been appealed from the state courts or from the lower federal courts for the determination of some legal or constitutional point. Nowadays the usual procedure in bringing up a case on appeal is by writ of *certiorari*. This writ is a formal order by which a superior tribunal instructs a subordinate court to certify to it the record of any case which has been decided by the court below. The Supreme Court may issue this writ at its discretion. It cannot be claimed as a matter of right by the appellant.

2. BY APPEAL.

The popular notion that anyone who is not satisfied with the decision of the highest tribunal of his own state may carry his case before the United States Supreme Court is far from being in accord with the facts. No litigant has a *right* to appeal from state to federal jurisdiction except where the highest state court (a) has held valid some state law which is alleged to be in violation of the federal Constitution, or of a law made by Congress, or of a treaty made by the United States, or (b) has held invalid a federal law or treaty. But since 1914, the Supreme Court has been given discretionary power to review the decision of a state court, if it sees fit, even when this decision has held a state law invalid on a question of federal right. Sometimes it consents to review such decisions; more often it declines.

NOT ALL CASES MAY BE APPEALED.

At any rate, most controversies which begin in the state courts end there. If, however, a case has been decided by the highest state court, and an appeal is permitted, this appeal goes directly to the Supreme Court of the United States. No subordinate federal court has any authority to hear and determine an appeal from the highest court of a state on any matter. A large part of the Supreme Court's work has nothing to do with the state courts. It mainly is concerned with the hearing of appeals which come up to it from the lower federal courts.

AND APPEALS GO FROM THE HIGHEST STATE COURT TO THE SUPREME COURT OF THE UNITED STATES.

Be it borne in mind, however, that nothing comes before the Supreme Court except as the result of an actual controversy. The court does not

concern itself with hypothetical questions. It does not prepare "advisory" opinions for the guidance of public officials, as some of the supreme courts do in the individual states. In 1793, President Washington submitted to the United States Supreme Court a series of twenty-nine questions concerning a proposed treaty, but the justices respectfully declined to answer. Nor will the court pass judgment upon political questions. The Constitution, for example, guarantees to every state a "republican form of government." But whether an existing government can be called republican in form is a political question, the decision of which rests with the President and Congress, not with the Supreme Court.

ONLY ACTUAL CONTROVERSIES, MOREOVER, ARE DECIDED.

THE POWER OF JUDICIAL REVIEW

As already indicated, the most distinctive attribute of the Supreme Court is its power of judicial review. This is the power to determine whether a law passed by Congress, or any provision in a state constitution, or any law enacted by a state legislature, or any other public regulation professedly having the force of law, is in consonance with the Constitution of the United States. The power is incidental to the court's authority to hear and decide such actual cases as may come before it. In deciding such cases, it determines whether a particular statute, upon the validity of which the case may turn, is in conformity with the Constitution. If the court decides that the statute is not in conformity with the Constitution, it merely refuses to give effect to the statute in question. This effectively nullifies the statute, because thereafter neither the Supreme Court nor any inferior court will recognize it as law and enforce it.

JUDICIAL REVIEW; HOW EXERCISED.

Many people have the idea that no court except the United States Supreme Court can declare a law of Congress to be unconstitutional. This is by no means the case. Any federal court, even a district court, can declare a law unconstitutional and decline to enforce it. But such decisions are not final; they may be appealed to the Supreme Court and reversed there. The correct way of stating the matter is to say that only the Supreme Court has *final* authority to declare a federal law unconstitutional. As regards laws passed by the state legislatures, moreover, the highest tribunal in each state has a similar final authority to declare that these are not in conformity with the state constitution and are for that reason unconstitutional. When such decisions are made, the Supreme Court of the United States will not interfere with them. When somebody says that a law "has

THE COURTS WHICH POSSESS THIS POWER.

been declared unconstitutional" he may mean either of two things: (1) that it has been held contrary to the national Constitution, or (2) that it has been held contrary to a state constitution. In most cases, as a matter of fact, he means the latter.

1. THE POWER BEYOND DISPUTE.

The power of judicial review over an act of Congress was first asserted by the Supreme Court in the case of Marbury *v.* Madison.[1] As pointed out in a previous chapter,[2] there were precedents for such action in the experience of the states under the confederation, but the Constitution itself nowhere expressly grants this power. Whether the court's action was justified in assuming so great a power has been for many years a much discussed question. Whole books have been written about it. It would take an entire chapter to set forth, even in outline form, the pros and cons of a question which has now become one of purely academic interest. For whether a right or a usurpation in its origin, the judicial supremacy of the Supreme Court over the laws of Congress, as well as over the constitutions and laws of the states, insofar as they conflict with the national Constitution, is now a fact, an indisputable fact. It is as clearly established as though it had been expressly provided in the original document. Congress, the state legislatures, and the country have accepted it as a fait accompli for more than one hundred years.

2. ITS EXERCISE HAS PROVED BENEFICIAL.

On the whole, the action of the court in thus asserting its power of judicial review has proved beneficial in its results. Had the court assumed a different attitude, the American constitutional system would have become a hydra-headed monstrosity of forty-eight rival sovereign entities. It could never have gained that strength and regularity of operation which it possesses today. In order to enforce a separation of powers between the executive and legislative arms of the government, and a division of powers between the state and the nation, there must be an arbiter to reconcile conflicts of jurisdiction. In order to protect individual liberty, there must be an arbiter between the government and the governed. The words of constitutions and laws are never so clear as to preclude all chance of dispute. There must be some authority with final power to interpret them. Accordingly, the powers of the courts, as Woodrow Wilson once said, "constitute the ultimate safeguard of individual privilege and of governmental prerogative." [3] The judiciary is the balance wheel of the whole system.

[1] 1 Cranch 137 (1803).
[2] See Chapter IV.
[3] *Constitutional Government in the United States* (New York, 1911), p. 142.

The power now exercised by the Supreme Court of the United States, moreover, is one which has been rarely exercised by the other high tribunals of the world. Until very recent years no court in any other land has openly ventured to nullify laws enacted by the highest legislative authorities. During the past quarter of a century, however, there have been some such decisions in a few Latin-American countries and in the British overseas dominions, such as Australia; but no court in Great Britain itself has ever declared a national law unconstitutional, nor has it the power to do so. That being the case, why is it essential or even desirable that the Supreme Court of the United States should possess this right of judicial review? The answer is threefold: first, the government of Great Britain is not based upon the principle of separating legislative and executive power. The executive in Great Britain is responsible to the legislature, that is, to the House of Commons. In the event of any difference between the two, the will of the legislature prevails. Second, there is in Great Britain no specific enumeration of constitutional privileges which are guaranteed to the citizen and with which parliament must not interfere. Hence, there are no civic rights which the latter cannot impair if it sees fit. Finally, Great Britain is not a federation of states and hence there is no rigid division of powers between states and nation. In a word, the need for a judicial arbiter is vastly greater in the United States than in the nation with which comparisons are most commonly made. The appeal to analogy in this case has no relevance at all. Incidentally, it may be mentioned that in Australia, where there is a division of powers between the federal and state governments (as in the United States), the supreme court exercises the power to declare federal laws unconstitutional.

3. IT IS ALMOST A UNIQUE POWER.

Finally, while the authority exercised by the Supreme Court of the United States is not generally exercised in other countries, it seems to fit the American temperament. For it simply means that Americans have adopted the practice of submitting to an impartial tribunal, made up of eminent jurists, all great questions of governmental jurisdiction which are liable to excite the passions of the people. If the rulings of the Supreme Court are not always agreeable to the popular sentiments of the day, it is because neither judicial nor public opinion is infallible. The doctrine set forth by Jefferson in the Virginia and Kentucky Resolutions that "as in all other cases of compact among parties having no common judge, each party (presumably each state) has an equal right to judge for itself" would have utterly disintegrated the nation. The Supreme Court, when

4. IT FITS THE NATIONAL PSYCHOLOGY.

all is said, represents as near an approach to a strictly nonpartisan body as the makers of any government have been able to devise.

THE COURT AND PUBLIC CONFIDENCE.

One reason why the Supreme Court has managed to retain a large measure of public confidence, despite many unpopular decisions, can be found in its refusal to decide political questions. It has always taken the attitude that questions of expediency must be left to the discretion of Congress. For example, it has held that Congress and the President, not the judiciary, must decide which of the two rival governments within the same state ought to have recognition.[1] In another case, it declined to render an opinion as to the lawful duration of military occupation in Cuba, holding this to be "the function of the political branch of the government." [2]

Individual members of the Supreme Court, moreover, have scrupulously avoided political entanglements. The justices, from the moment they ascend the bench, cease to be Democrats or Republicans and cut themselves off from all active participation in party politics. Not only that, but they abstain from any business connection, however remote, which might tend to impair their impartiality. When a justice is appointed to the Supreme Court, he even changes his investments (if he has any) into noncommercial securities so that he may not appear self-interested. People may question the advisability of allowing any nine men to exercise the great powers which the Supreme Court now possesses, but there are few who ever question the integrity of the justices.

CRITICISM OF THE COURT: "FIVE-TO-FOUR" DECISIONS.

Although the preeminence of the Supreme Court in the American constitutional system has been generally accepted, criticism has frequently arisen over the manner in which it exercises its authority. A perennial favorite for the shafts of the critics has been its so-called "five-to-four decisions," or decisions in which five of the justices hold a law unconstitutional while four dissenters declare it to be valid. In this way, it is argued, a single justice, who holds office for life and is not responsible to the voters, may set aside the action of Congress and the President, both of whom are the people's representatives. The court's critics like to harp upon this alleged "one-man tyranny" as an undemocratic arrangement which ought to be terminated without delay.

WHAT ARE THE FACTS?

Two things can be said in reply to this contention. In the first place, very few laws of Congress have been declared unconstitutional by a close vote of the justices. There have been only a handful of such cases in the whole history of the court, and of these even fewer were of any substantial importance. In the second

[1] Luther *v.* Borden, 7 Howard 1 (1848). [2] Neely *v.* Henkel, 180 U. S. 109 (1901).

place, no statute of Congress has ever been declared unconstitutional by the action of a single judge. No "one-man decision" has ever been made by the court. To make a majority decision takes one man plus enough others to form a majority. It is true, no doubt, that a five-to-four decision could not be made without the vote of the fifth judge; but neither could it be made without the votes of the other four. A similar situation exists in the Senate, where the Vice-President, who is not a member of that body, may cast the deciding vote; and in the House of Representatives, where important legislation has been passed by a majority of one, that is, by the casting vote of the Speaker. Was this also "one-man tyranny"? Manifestly not, for it takes half of those voting in each house to make the casting vote a majority.

Nevertheless, the one-man argument seems to carry weight with a large number of people, and plans for limiting the authority of the court have been brought forward. It has been suggested that a two-thirds vote or even a unanimous vote of the justices ought to be made requisite for declaring a national law unconstitutional. But this would hardly accomplish the end in view. Some one judge would still hold the balance. One judge would determine from time to time whether the necessary two thirds, or the necessary unanimity, could be had. Fewer laws would be declared unconstitutional no doubt; but close decisions (including one-man decisions) would continue to be given. We require trial juries to be unanimous in criminal cases, and our experience has shown that one juryman, by holding out against the other eleven, can keep a defendant from being acquitted or convicted.

PROPOSED HIGHER REQUIREMENTS OF VOTES IN THE COURT.

A more serious criticism of the court's power alleges that its decisions on constitutional questions have often clogged the wheels of progress and prevented the valid enactment of economic and social reforms. This complaint has been made on many occasions during the past hundred and fifty years, not merely by carping critics but by the nation's leaders. Presidents Jefferson, Jackson, and Lincoln, as well as Franklin D. Roosevelt, are among those who publicly condemned certain decisions of the court on this score. Yet in looking back over the nation's history, will anyone assert that we would have been better off if the Supreme Court had never taken the stand which it took in Marbury *v.* Madison, but had surrendered to Congress the unfettered right to decide the constitutionality of its own laws? Or, on the whole, would we be better off in the future? That is the real question to be considered in connection with proposals

CRITICISM THAT THE COURT BARS SOCIAL PROGRESS.

RESULTING PROPOSALS TO ABOLISH OR LIMIT THE POWER OF REVIEW.

to adopt a constitutional amendment taking away the court's power of judicial review. A less drastic proposal is to amend the Constitution in such way as to provide that when a measure has been held unconstitutional by the Supreme Court it shall then be resubmitted to Congress and, if sustained by a two-thirds vote, it shall be deemed in full force and effect, the court's decision notwithstanding. Both the foregoing proposals, however, have lost much of their strength in recent years for reasons which will be explained in the next few paragraphs.

RECENT REVIVAL OF ATTACKS ON THE COURT.

The most recent and probably the most powerful attack ever launched against the Supreme Court because of its alleged conservatism occurred in 1937 after it had rendered decisions which invalidated certain laws which had been enacted as part of President Roosevelt's "New Deal." In quick succession the court held unconstitutional the National Industrial Recovery Act, the first Agricultural Adjustment Act, the Guffey Coal Act, a railroad pension act, and a state minimum wage law. These decisions, following right on each other's heels and dealing with highly controversial issues, provoked the sharpest kind of public debate. In the endeavor to strike while the iron was hot, President Roosevelt secured the introduction into Congress of a court reorganization bill. One section of this measure authorized the President (with the consent of the Senate) to appoint one additional justice for every member of the existing Supreme Court who had reached the age of seventy without retiring, the number thus appointed to be not more than six. Under this proposal, the total number of justices (assuming that none of the existing justices then over seventy retired immediately) would have been raised from nine to fifteen. The Constitution, it should be mentioned, places no limit upon the number of justices. It gives Congress full power to determine this. Taken at its face value, the proposal merely aimed to rejuvenate the court by an infusion of new and younger members. But a large body of opinion, both in Congress and in the country, pounced upon the suggestion as a deliberate attempt to "pack" the Supreme Court with justices who would reverse the trend of the court's previous decisions. In the end, Congress rejected the proposal to enlarge the court in this way.

THE COURT REORGANIZATION BILL OF 1937.

There is, of course, no way of avoiding conflicts of this sort; and one can be reasonably certain that they will recur. Yet it is significant that the court has always come through them successfully and continues to act as the great umpire of constitutional issues as well as the protector of those rights which are guaranteed to individuals and to minorities by the supreme law of the

NO REAL ALTERNATIVE TO JUDICIAL SUPREMACY.

land. When the sober second thought of the nation has been brought to bear upon this whole question, it is generally realized that whatever dissatisfaction may arise over the court's exercise of its great power, there is no workable substitute for it. The only alternative is to give Congress more power, or complete power, to determine the constitutionality of its own laws. That, to be sure, would be a practicable step, but it would also be a step towards the abolition of several features which have marked the American system of government from the beginning — among them the separation of powers, the reserved sovereignty of the states, and the constitutional protection of private rights.

In this connection it is appropriate to point out that the activity of the Supreme Court in invalidating legislation, especially national legislation, has been much exaggerated in the public mind. There is a common impression that the court bowls over an act of Congress every few days. But in the entire history of the tribunal, covering more than a century and a half, fewer than a hundred federal laws have been held invalid. It is true that many of these have been measures of high importance, and the court's decisions have sometimes affected in a fundamental way the course of political development. On the other hand, it should not be forgotten that at least a thousand times as many congressional statutes have encountered no judicial barrier. So it is quite misleading to use the term "judicial veto" in the sense that we speak of the executive veto. President Cleveland, for example, vetoed more actions of Congress in a single term than the Supreme Court has invalidated in more than a hundred and fifty years.

NUMBER OF LAWS HELD UNCONSTITUTIONAL.

PERSONNEL AND PHILOSOPHY

The Supreme Court of the United States began its work in 1790 with John Jay as its first chief justice.[1] He had with him five associate justices, more than were really needed to handle the small amount of business which came before the court. At its first meeting no cases appeared; the court appointed a clerk and then adjourned for lack of anything else to do. During the initial ten years of its history, the court decided only six cases involving questions of constitutional law; and, when John Marshall became chief justice in 1801, there were only ten cases awaiting him on the docket. Thus far the court had not exercised any great influence on the nation's political development. Its most important

EARLY HISTORY OF THE COURT.

ITS CHIEF JUSTICES.

[1] The correct title is "Chief Justice of the United States," not "Chief Justice of the Supreme Court."

decision upon a constitutional question, moreover, had created a storm of protest and had been set aside by the action of the states in adopting the eleventh amendment.[1] The prestige of the court was relatively small, and a position upon its bench during these early years was regarded as less attractive than the post of a governor or senator. Chief Justice Jay, for example, resigned from the Supreme Court in 1795 to serve as governor of New York.

During the next few years the position of chief justice was bandied about somewhat; but in 1801 John Marshall was given the reins and he held them firmly for more than three decades.[2] Born in Virginia, he saw service as a captain in the Revolutionary army when only twenty-one years of age. While still a young man he studied law and entered politics, like so many other young Southerners of his day. Although not one of those who framed the federal Constitution, Marshall was a member of the Virginia convention which ratified it in 1788, and was on intimate terms with some of those who had a hand in its making. He declined the post of attorney general in Washington's cabinet, but was elected to Congress and later became secretary of state under John Adams. Marshall was appointed chief justice in the outgoing days of this administration, only a few weeks before the inauguration of Jefferson.

JOHN MARSHALL.

This great chief justice was a Federalist in the original sense of the term, a believer in a strong central government, and he lost no opportunity of making his influence felt in that direction. When he took office, the powers of the national government under the Constitution were not sharply defined; scarcely a clause of the Constitution had been subjected to judicial interpretation. To the work of making it "efficient," however, Marshall and his associates promptly set their hands. A succession of great decisions during the next thirty years not only cleared the constitutional horizon, but enormously strengthened the lawmaking arm of the national government and incidentally raised the court to a position of great authority.[3] John Marshall was not only a great jurist but a great statesman, and

HIS CONSTITUTIONAL VIEWS AND INFLUENCE.

[1] Chisholm *v.* Georgia (1793). See pp. 552–553.

[2] On Jay's resignation John Rutledge was named chief justice and assumed the office, but was not confirmed. Then the post was offered to William Cushing, who was already an associate justice, but he declined it. Oliver Ellsworth was then (1796) appointed and confirmed. He resigned in 1800. Then came John Marshall (1801–1834) and Roger B. Taney (1836–1864), followed by Salmon P. Chase (1864–1873), Morrison R. Waite (1874–1888), Melville W. Fuller (1889–1910), Edward D. White (1910–1921), William H. Taft (1921–1930), Charles Evans Hughes (1930–1941), and Harlan F. Stone (1941–1946).

[3] For an exhaustive account see Albert J. Beveridge, *Life of John Marshall* (4 vols., Boston, 1916–1919).

he had the advantage of a clean slate to write upon. There was as yet no long train of decisions to hamper the court's freedom, no doctrine of *stare decisis*, for there were no decisions to let stand. On the other hand, his task was one of great difficulty, for the period through which he guided the Supreme Court was critical in many ways. The issues which came up for adjudication were ones which had created widespread public interest, and the court, on several occasions, had to take a stand which aroused strong resentment. State officials everywhere looked with suspicion upon what seemed to be a steady encroachment upon state powers. During his thirty-four years of service, Marshall wrote the decisions of the court upon no fewer than thirty-six questions of constitutional law.[1]

THE MAN AND HIS WORK.

Under Marshall's leadership the court first undertook to assert its place as the guardian of the Constitution, with authority to invalidate any law, whether state or federal, which contravened the provisions of this instrument. The great chief justice also enunciated and maintained two outstanding principles of constitutional construction: in the first place, he insisted that every power claimed by Congress must be articulated to some provision of the Constitution, the onus of finding an express or implied grant of power being imposed upon the federal authorities. But, in the second place (and here is where he made his great contribution), Marshall held that any grant of power, when once found, should be interpreted liberally, giving to Congress all reasonable discretion as to how the authority should be exercised.

ESTABLISHMENT OF JUDICIAL REVIEW UNDER HIS LEADERSHIP.

HIS PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION.

"No other man," says Lord Bryce, "did half so much either to develop the Constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the Constitution. No one vindicated more strenuously the duty of the court to establish the authority of the fundamental law of the land; no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark: the traditions which were formed under him have continued in general to guide the action and elevate the sentiments of their successors." [2]

LORD BRYCE'S ESTIMATE.

[1] These include such great landmarks as Marbury *v.* Madison, McCulloch *v.* Maryland, Gibbons *v.* Ogden, and the Dartmouth College Case. For a brief review of these decisions, see William B. Munro, *The Makers of the Unwritten Constitution* (New York, 1930), pp. 53–84.

[2] *The American Commonwealth*, Vol. I, p. 268.

Marshall died in 1835 after having firmly laid the foundations of the Supreme Court's power. His successor, Roger B. Taney of Maryland, was a man of different stripe, a disciple of Andrew Jackson, and a stanch exponent of the states' rights doctrine. Under Taney's guidance there was a reaction against the centralizing of powers in the federal government. Taney's most notable decision was delivered in the Dred Scott Case (1857). In this instance, the court applied rules of strict construction to the powers of Congress, even within the territories, by holding that Congress had no right to prohibit any citizen from owning slaves in such areas. "No word can be found in the Constitution," said Taney, "which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description." In some of its other decisions during the early years of the Civil War, moreover, the court seemed to be placing obstacles in the way of a full exercise of the national government's powers.

MARSHALL'S SUCCESSOR: ROGER B. TANEY.

Following the Civil War and the disappearance of the older issues of slavery and states' rights, the court became mainly concerned with the solution of legal issues arising out of the extraordinary economic and social advances which the nation made in the next six or seven decades. The successors of Marshall and Taney, jurists such as Melville W. Fuller, Edward D. White and, more recently, William H. Taft and Charles Evans Hughes, presided over a court which became increasingly concerned with questions of industry, trade, and social welfare. The great decisions during these decades have pertained to the regulation of corporate business, with taxation, labor questions, welfare legislation, and the expansion of governmental activities into the realm of business. They have been decisions which, because of their effect upon the pecuniary interests of various groups in American society, have often engendered public debate and criticism; and they have required a breadth of knowledge in the field of the social sciences beyond what is normally acquired in the study and practice of the law. Nevertheless, it can fairly be said that, although the Supreme Court has occasionally taken a legalistic view of great economic and social issues, it has adapted itself surprisingly well to rapidly changing conditions. This is not to imply that (as Mr. Dooley once jocularly remarked) "the Supreme Court keeps its eye on the election returns," but simply that its justices have been, almost without exception, men of sense and discernment.

THE COURT AND THE NEW ORDER.

In addition to the chief justices, other jurists of high eminence have adorned the supreme bench during its life of nearly eight-score years.

Among its earlier associate justices were several of the "Fathers" themselves — John Rutledge, James Wilson, Oliver Ellsworth, John Blair, and William Paterson. They interpreted the work that they themselves had done. Later, during the first half of the nineteenth century, Joseph Story served his long term of thirty-four years (1811–1845). Story is rightly regarded as the classic expounder of the Constitution, and his elaborate commentaries on it continue to hold the admiration of legal scholars at the present day.[1] Next to Marshall, moreover, Story had the largest influence in shaping that notable series of decisions which put vitality into the strip of parchment on which the nation was founded. Others whose names stand out conspicuously on the roll of the justices are Salmon P. Chase, Stephen J. Field, John M. Harlan, Horace Gray, Louis D. Brandeis, Benjamin N. Cardozo, and Oliver Wendell Holmes — all of them notable personalities. The last-named justice gained a unique place on the roll of great American jurists by reason of his skill in writing decisions which the ordinary layman could read, understand, and enjoy.[2] It is a great art to combine law and logic with good literature.

JOSEPH STORY.

The work of the Supreme Court is far more difficult, and more exacting, than the average citizen imagines. To him it is merely a matter of reading the Constitution and telling the people what it means. But the Constitution is not merely a set of verbal formulas which, once interpreted, bear that meaning for all time. The meaning of its clauses is not to be understood by taking the words in one hand and a lexicon in the other. Every provision in this document must be construed as a dynamic affair, related to the times and circumstances in which it is applied. As industrial technique and our ways of life change with each generation, the constitutional provisions must be harmonized with these altered conditions. If the Constitution were a static affair, a series of inflexible provisions set down on paper, it would have been discarded through sheer necessity some years ago. But, as Marshall once said, it is a document that has to be freely adapted "to the various crises in human affairs." [3]

DIFFICULTY OF THE COURT'S TASKS.

This does not mean, of course, that changes in the interpretation of constitutional provisions are made lightly, or in obedience to judicial caprice. When the Supreme Court has once made a ruling of law, this ruling becomes a precedent and will be generally adhered to in future cases of the same nature. This is known

THE DOCTRINE OF *stare decisis*.

[1] *Commentaries on the Constitution of the United States*, in two volumes. There have been many editions.

[2] Alfred Lief (editor), *The Dissenting Opinions of Mr. Justice Holmes* (New York, 1929).

[3] For a further discussion, see H. L. McBain, *The Living Constitution* (New York, 1927).

as the principle of *stare decisis* — stand by the decision. The burden of proof is on those who ask that the rule be changed. And were it not for this principle, no lawyer could advise anyone with a reasonable assurance of being right. So the Supreme Court does not often reverse its stand; nevertheless, there have been some notable instances of such reversal. For example, it decided in 1880 that an income tax might be levied by Congress without apportionment among the states, and fourteen years later it ruled that such taxes must be apportioned.[1] On another occasion, the court decided that Congress could not constitutionally enact a law making paper money a legal tender in payment of debts which had been incurred before the passage of such legislation.[2] A year later, with changes in the personnel of the court, it upset this decision and held that Congress did have power to pass such legislation.[3] More startling still was the reversal of judicial attitude which came towards the end of the 1930's when, owing to a series of resignations and deaths among the justices, the court found itself with a majority of newly appointed members. Thereupon it rendered a series of decisions sustaining various acts of Congress which would hardly have gained the court's approval a few years earlier. And within very recent years it gave a notable illustration of its willingness to reverse itself by ruling that the business of insurance comes within the scope of congressional authority to regulate interstate commerce, thus setting aside a decision to the contrary which had stood firmly for seventy-five years.[4]

But when the court desires to modify a prior decision, there are ways of doing this other than by a frank reversal. No two cases are exactly alike when they come up for trial; hence, a later case can be differentiated from an earlier one and a different ruling made. Thus the court once held that Congress could impose a prohibitive tax on oleomargarine when shipped in interstate commerce; then, some years later, it ruled that a similar tax could not be imposed by Congress on profits from the products of child labor shipped from one state to another.[5]

REVERSAL BY THE DIFFERENTIATION OF CASES.

This right to change its attitude, either openly or by indirection, is one of the things which enables the Supreme Court to keep the Constitution endowed with resiliency. In matters strictly affecting rights of life, liberty, and property, it is obviously essential that the interpretation of

[1] See pp. 370–371.

[2] Hepburn *v.* Griswold, 8 Wallace 603 (1869).

[3] Knox *v.* Lee, 12 Wallace 457 (1870).

[4] See the decision in United States *v.* Southeastern Underwriters' Association, 322 U. S. 533 (1944), reversing Paul *v.* Virginia, 8 Wallace 168 (1869).

[5] The court refused to regard the child labor tax as a bona fide revenue measure.

the law shall not be subject to frequent and capricious changes. Otherwise all individual rights, contracts, and business relations would be clouded by uncertainty. But where issues of public policy are concerned, the rigid application of *stare decisis* would slow down the machinery of social progress. In court decisions, as in all other expressions of human judgment, a reverence for the past may be carried too far. It is the function of the judiciary to facilitate social progress, but in an orderly way. A court should not reverse its own decisions, therefore, until it is satisfied that greater justice than injustice will be done by such action.

INADVISABILITY OF FOLLOWING PRECEDENTS TOO STRICTLY.

It has been mentioned that the Supreme Court of the United States, unlike the supreme courts in some of the states, does not render advisory judicial opinions. In many ways this self-imposed restriction has been unfortunate. It means that, in many cases, the court sometimes does not render a decision on the constitutionality of a law for a year, or even for several years, after it has been passed. Then there are omelets to be unscrambled. The National Industrial Recovery Act of 1933 was not held unconstitutional until 1935; meanwhile, millions of employers had changed their methods in conformance with its provisions.[1] It has been suggested that Congress might provide, by an amendment to the judiciary act, for the rendering of advisory judicial opinions by the Supreme Court whenever requested by the President or by resolution of the national legislature. In that way the unconstitutionality of a proposed measure could be pointed out in advance, as is done by the highest court in some of the states.[2] But it may well be doubted whether the Supreme Court would hold itself required to give advisory judicial opinions, even if Congress empowered or even directed it to do so.

ARE ADVISORY OPINIONS DESIRABLE?

THE LOWER FEDERAL COURTS

Next, below the Supreme Court, comes the circuit court of appeals. The territory of the United States is divided into ten circuits, each circuit containing several adjacent states. There is a circuit court of appeals for each of these ten circuits, such courts having from three to six judges, but two judges are always required as a quorum for the hearing of cases.[3] The circuit court of appeals in each circuit holds sessions at various cities, hearing appeals from the district courts as well as from the rulings of administrative bodies, such as the federal trade commission. These circuit courts of appeals have no original

THE CIRCUIT COURT OF APPEALS.

[1] See pp. 444–446. [2] See p. 735.

[3] In case of a tie the issue may be certified to the Supreme Court for decision or instructions.

jurisdiction, that is, they hear no cases in the first instance. In many cases, where no issue relating to the constitutionality of a law is raised, the circuit court of appeals has final authority. Thus, they serve to stem the flow of appeals which would otherwise clog the docket of the supreme tribunal at Washington. But when a circuit court of appeals (in any case coming before it on appeal from a lower federal court) declares a state law unconstitutional, an appeal may be carried to the Supreme Court of the United States. In other cases, the right of appeal depends upon the willingness of the Supreme Court to review the issue. This it ordinarily does where the case raises significant questions involving the federal Constitution or laws.

THE FEDERAL DISTRICT COURT.

Then come the federal district courts. The entire territory of continental United States is divided into eighty-four districts. Each state constitutes at least one district, while the more populous states have two, three, or even eight, within their boundaries. In a few cases, a district is made up by taking portions of two or more states. When there is more than one judge in a district, each holds court simultaneously; they do not sit together. This expedites the handling of business. Judges can also be shifted temporarily from one district to another, whenever such action becomes desirable through pressure of litigation.

ITS OFFICERS.

A federal district court holds two or more sessions each year, sometimes sitting at various places within the district. It is a court of first instance, and the only federal court in which a jury is used. Most of the cases which come directly within the federal judicial power are tried in one of these district courts and the great majority of them end there. Every district court has its United States attorney and United States marshal, appointed by the President with the concurrence of the Senate. The function of the district attorney is to act as the representative of the nation in prosecutions before the court. The marshal executes the court's orders and judgments, attends to the service of its writs, and is its general executive officer. Both are under the direction of the federal department of justice. Each district court also has a federal commissioner who conducts the preliminary hearing in criminal cases and decides whether an accused shall be held for the grand jury.

THE SPECIAL OR "LEGISLATIVE" COURTS.

All federal courts discussed up to this point are sometimes called "constitutional" courts because they are established by Congress under the judiciary article (Article III) of the Constitution. But, in addition, there are certain special courts which are commonly called "legislative" tribunals, because they have been established by Congress under some specific grant of

legislative power conferred in Article II of the Constitution. To these special courts the constitutional provisions as to the appointment and life tenure of judges, as well as the guarantee against reduction of their salaries, do not extend.

First among these special courts is the court of claims which consists of a chief justice and four associate justices appointed by the President.

THE COURT OF CLAIMS.

It has been set up because no one possesses the right to sue the United States in the regular courts without its consent. As it did not seem fair to deny all redress to citizens who might have just claims against the federal government, this special court was created to hear and determine the merits of such claims, particularly those arising out of contracts. In certain cases there is a right of appeal to the Supreme Court. When the decision is against the government, an appropriation for the amount of the award is made by Congress as a matter of course. It should be understood, however, that the court of claims does not possess authority to entertain all suits against the United States. It has jurisdiction only over such classes of claims as Congress has allotted to it.

Then there is a customs court (in reality it is a board of appraisers) which makes rulings on controversies as to valuations and duties arising under the tariff. It has nine judges. Its rulings are subject to review by a court of customs appeal consisting of five judges; and its decisions, in turn, are in certain exceptional cases subject to review by the Supreme Court. Somewhat strangely, the court of customs appeal is given the right to hear appeals from decisions made by the patent office and, consequently, its name was changed in 1929 to the court of customs and patent appeals. There is also a tax court of the United States with fifteen judges which hears and decides controversies arising out of the internal revenue laws.

OTHER SPECIAL COURTS.

Courts in the District of Columbia, Hawaii, Alaska, and Puerto Rico are also special courts. They have been established by Congress through its constitutional power to provide for the government of the national capital and the territories. From these special territorial courts, appeals are sometimes carried to a circuit court of appeals or to the Supreme Court. Under the so-termed Philippine Independence Act of 1934, the United States Supreme Court was also given the right to hear appeals in certain instances from the courts of the Philippine Commonwealth.

TERRITORIAL COURTS.

Recent years have witnessed the adoption of several noteworthy reforms in the internal administration of the federal judicial system. One of these was the creation in 1922 of an annual judicial conference pre-

sided over by the chief justice of the United States and attended by senior circuit court judges and occasionally by other federal judges and officials as well. This conference considers all sorts of matters relating to the work of the federal judiciary, including suggestions for relieving crowded dockets and reforming the rules of judicial procedure. It makes recommendations to Congress for such legislation as will carry these reforms into effect. As presiding officer of the conference, the chief justice has thus been given a degree of supervision over the entire judicial system. Still another important reform was the establishment in 1939 of an administrative office of the United States courts, the director of which is appointed by the Supreme Court. Under the supervision of the senior circuit court judges, this office handles the financial and bookkeeping details as well as much of the routine administrative work incidental to the operation of the lower federal courts. It also keeps the supervising judges informed of the volume of business in the various courts, the state of their dockets, etc. Likewise, it provides the federal courts with equipment and supplies. Finally, it has the function of auditing the accounts of court officials and employees. The establishment of this office has relieved the judges of the responsibility for handling all manner of routine details.

RECENT IMPROVEMENTS IN THE COURT SYSTEM.

1. THE JUDICIAL CONFERENCE.

2. ADMINISTRATIVE OFFICE OF THE COURTS.

In the constitutional courts of the federal system, the judges are appointed for life or during good behavior. They are removable only by impeachment before the Senate of the United States. Their salaries may not be diminished during their tenure of office. The rule covering these matters cannot be paraphrased into any clearer or more concise language than that of the Constitution itself:

PROTECTIONS FOR THE INDEPENDENCE OF THE FEDERAL COURTS.

> The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

But this does not mean that Congress has no control over the courts. It can reorganize, or even abolish, any federal court except the Supreme Court. Even in the case of the Supreme Court, it can increase the number of justices and thus change the character of the court. Congress could not reduce the existing number of justices by dismissing some of them, but it would be allowable to provide that vacancies shall be left unfilled until a desired reduction is accomplished. Moreover, Congress can alter the power of the Supreme Court to hear appeals, for (as already pointed out)

the Constitution provides that the Supreme Court "shall have appellate jurisdiction . . . with such exceptions and under such regulations as Congress shall make." [1] Finally, there is no way in which the judges in any federal court can obtain their salaries except by means of a congressional appropriation, and no court can mandamus Congress into making an appropriation for this or any other purpose. The federal courts are not independent in the sense that the people, through their representatives, have no control over them.

LAW AND JUSTICE.

Some years ago the writer was listening to the discussion of an adjudicated case in a law school classroom. The decision in this particular instance appeared to have been in accord with the plain intent of the law, but obviously unjust to one of the suitors. "That may be good law," suggested one of the students, "but it isn't justice!" "That may be true," replied the professor, "but if it's *justice* you want to study, go over to the divinity school; it's *law* we're studying here." This reply amused the class, of course; but the student was merely making the sort of comment that most laymen would have made under the circumstances. We speak of our courts as courts of justice, and it is justice that the average layman expects them to administer. He forgets that what judges are sworn to administer is *the law*.

Yet the whole purpose of the law is to establish justice. Its design is to ensure every man a square deal. Of course the law does not always succeed in achieving this end, for it is the product of human activity and as such is subject to human deficiencies. A self-evident proposition it is, or ought to be, that when the provisions of a law are clearly unjust, no judge can wring justice out of them without violating his oath to administer the law without fear, favor, or affection. He may interpret the written words broadly or narrowly, thus providing some leeway in the interest of justice, but he cannot disregard the obvious intent of constitutions or statutes. He cannot declare that property belongs in justice to one man when by the provisions of the law it clearly belongs to another. Many of the "unjust decisions" which arouse the ire of people from time to time should therefore be blamed upon the lawmakers and ultimately on the voters who choose these lawmakers. The people send inexperienced and dull-witted men to represent them in Congress, or in the state legislatures; these representatives enact some ill-advised law; the judges then apply its plainly written provisions; and the result is an indignant outcry against the autocracy of the courts. What are judges for, the unthinking ask, if not to administer *justice*. The answer is that to require the judges to administer what they believe to be justice, even in

[1] Article III, Section 2, paragraph 2.

disregard of constitutions and laws, would be the very essence of autocracy. There would be no surer way to abolish a government of laws and substitute a government of men.

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CHAPTER XXXVI

THE PLACE OF THE STATES IN THE NATION: PAST AND PRESENT

If there be any among us who wish to dissolve this Union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left to combat it. — *Thomas Jefferson.*

State government in the United States represents the exercise of those powers which have not been delegated to the nation. These are the powers which according to the tenth amendment are reserved to the states or to the people. It was assumed by the framers of the Constitution that this residual authority of the states would far outweigh the delegated powers of the nation. This assumption has, however, not been borne out in practice. Liberal or loose construction and the doctrine of implied powers won the day over strict construction of the Constitution's clauses in the first years of Washington's administration; and the century and a half which has since elapsed has witnessed the slow, but none the less certain, shift of emphasis in political power from the states to the national government.

THE DELEGATION OF POWERS TO THE NATION.

AND THE EARLY VICTORY OF LIBERAL CONSTRUCTION.

But though the states may have lost much of their potential authority under the Constitution as it was designed by its makers, they are none the less more important governmental entities today than they have been in the past. This is due to the fact that there has been an over-all expansion of governmental power in the country as a whole, and an intensification of governmental activity at every level, local and state as well as national. The individual states raise and spend far more money today than ever before; they engage in a greater number of regulatory activities and provide services to the public which, a generation or two ago, were supplied in a rudimentary fashion or sometimes not at all.

CONTINUING IMPORTANCE OF THE STATES.

Moreover, the states are still the pivot around which the whole American political system revolves. Were it not for the states, the national government could not function; a President could not be elected, nor

could congressmen be chosen; for it is the states that arrange the congressional districts, prepare the voters' lists, and provide the machinery of elections. In them, too, is to be found the organized party life of the nation, so important in the actual conduct of our electoral institutions — national parties being little more than instruments for coordinating the individual state units of the same partisan allegiance for nation-wide electoral campaigns. Again, without the action of the state legislatures (either by ratifying or initiating proposals), no formal amendment could be added to the federal Constitution. Likewise, if the states did not exist, there could be no county, city, or town governments; for all of these derive their authority, and even their legal existence, from state constitutions and state laws.

THEIR SIGNIFICANCE IN THE FEDERAL SYSTEM.

The average citizen has no adequate conception of how much the state government does for him. When he speaks of the government, he usually means the national government. Such an attitude of mind has been accentuated during recent years by the concentration of public attention upon the social and economic experiments which have been sponsored by Congress and the national executive, as well as by the increasingly important role which the national government has had to play in international affairs. It is a readily understandable attitude; but no responsible citizen should allow it to obscure the fact that the state is still doing a large part of the governing. It is under the auspices and laws of the state that a citizen's birth is registered, a school is provided for him, and often a state university; it is the state which furnishes him with highways on which to travel and regulates the speed thereon; it is the state which enfranchises the telephone company, the lighting company, and most of the other public utilities which serve him; it is the state which protects his life and property, maintains peace on the home front, and punishes criminals who threaten or injure him; it is the state which validates his marriage and grants him his divorce (if he gets one); it is the state which licenses him to practice a profession or permits him to pursue a trade; it is also the state which often provides a hospital when he is ill and grants the burial permit when he dies. From birth to death the citizen is in daily contact with the state, whereas in normal times his contacts with the national government are relatively infrequent and vicarious. American citizens generally should take more interest in their state and local governments. The work of the national government is more dramatic and receives more newspaper headlines; but this does not mean that it is normally of larger extent or of greater significance in the daily life of the individual.

WHAT THE STATES DO FOR THE PEOPLE.

THE STATES IN THE UNION

The forty-eight states of the American Union are very unequal in size and population, but they are equal before the law. All are sovereign within their own sphere and all are subject to the same constitutional limitations. Much ink has been wasted in disputations as to whether the states are really sovereign; but here, as in many other political controversies, a great deal depends upon what is meant by the term. The thirteen original states were sovereign enough to make the nation; and they and the others which have been admitted to the Union since 1789 possess the constitutional power to unmake the nation if they choose. In other words, no power has been given the national government which the states cannot take back by constitutional amendment. Meanwhile, as members of the Union, all states have the same obligations to the national government, to one another, and to the citizens of the United States. No state has, or can have, any special privileges under the existing national Constitution. At the same time it must be re-emphasized that no state has the power on its own initiative to secede from the Union. That issue, on which men so vigorously disagreed prior to the Civil War, was irrevocably settled by the outcome of that great conflict. From that time forth, as the Supreme Court tersely described the situation, the nation has been an "indestructible Union composed of indestructible states." [1]

LEGAL EQUALITY OF THE STATES.

THE UNION IS "INDESTRUCTIBLE."

Since all states are equal, Congress is not permitted to play any favorites among them. It must treat them all with an even hand. At the same time Congress may exact, and sometimes has exacted, certain conditions as the price of a new state's admission to the Union. Congress can do this because full discretion as to whether a new state shall be admitted rests in its own hands. "New states may be admitted by Congress into this Union" is the wording of the Constitution, and these words clearly leave the terms of admission to Congress to decide. Accordingly, in 1894, Utah was required, as a condition of its admission, to abolish plural or polygamous marriages and to make the abolition "irrevocable without the consent of the United States." Again, in 1906, when Oklahoma was admitted to the Union, Congress required that the constitution of the new state should contain a provision which pledged that the state capital would not be removed from the city of Guthrie for at least fifteen years. Several

LIMITATIONS UPON NEW STATES AT ADMISSION.

[1] Texas *v.* White, 7 Wallace 700 (1869).

other states have also been admitted with congressionally imposed conditions.

But once the state is actually admitted to the Union, there is no legally binding force to such promises or conditions. The new state is then the political equal of all other states and cannot be held to any continuing political limitations which the federal Constitution does not apply to all other states. Arizona, for example, was refused admission to statehood until she took out of her proposed constitution a provision for the recall of judges. Immediately after being admitted to full membership in the Union, Arizona proceeded to restore this provision to her constitution, and there was nothing that Congress, or any other body, could do about it. The admission, having become an accomplished fact, became also an irrevocable act, and from that point forward Arizona had the same right to arrange her political institutions under the provisions of the federal Constitution as was enjoyed by every other state. The Supreme Court has, to be sure, sometimes interfered when a newly admitted state violated a condition which Congress interposed precedent to statehood; but such interference has occurred only when the condition related to some property right which the national government had granted to the new state, and the state had proceeded to abuse that right.[1] The Supreme Court has uniformly upheld the power of the newly admitted state to violate any *political* condition which Congress may have imposed.

THESE LIMITATIONS ARE INAPPLICABLE AFTER ADMISSION.

In connection with the admission of new states, the federal Constitution declares that "no state shall be formed or erected within the jurisdiction of any other state, nor shall any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned." [2] Hence, it would not be permissible to make New York City a separate state, as has sometimes been proposed, unless in addition to congressional authorization, the legislature of New York State gave its consent, which it would not be likely to do. Actually several states have been formed by partition of the domain of an existing state with the consent of that state's legislature. Thus, Kentucky became a part of the Union in 1792 with the consent of the legislature of Virginia, its territory having originally been a part of the Old Dominion. Likewise, Maine was set up as a state in 1820 with the consent of the Massachusetts legislature, the new state's territory having originally been claimed by Massachusetts. Even the separation of the new state of West Virginia

LIMITATIONS ON THE POWER TO CREATE NEW STATES.

[1] Stearnes *v.* Minnesota, 179 U. S. 223 (1900).
[2] Article IV, Section 3.

from Virginia in 1863 was accomplished with the technical consent of the latter state, this consent having been given by those members of the Virginia legislature who had not joined the Southern cause in the Civil War and who, in the eyes of Congress, constituted the valid legislature of the state.

THE PROCESS OF ADMISSION.

The process of admission to statehood is relatively simple. The usual first step is the presentation of a petition to Congress from the legislature or people of a territory asking that they be organized as a state of the Union. If Congress regards this petition favorably, it passes an enabling act, authorizing the people, through a constitutional convention, to draw up a state constitution. This constitution, having been framed and accepted by the popular vote of the territory concerned, is then submitted to Congress, whereupon the territory is declared by resolution of Congress to be a state and its representatives are admitted to the national legislature.

FEDERAL GUARANTEES TO THE STATES

1. A REPUBLICAN FORM OF GOVERNMENT.

All states, old and new, are entitled to certain guarantees at the hands of the national government. The first of these is contained in the clause of the Constitution which declares that "the United States shall guarantee to every State in this Union a republican form of government." [1] There were those who thought this guarantee a needless precaution. But James Madison, the "father of the Constitution," did not share these views. ". . . Who can say," he wrote, "what experiments may be produced by the caprice of various states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers"? Exactly what is meant by "republican government" the Constitution does not explain; but it is reasonable to suppose that its makers had in mind the type of government existing in the original states at the time the Constitution was adopted. Hence, as long as a state continues to maintain a reasonable approximation to a government which derives all of its powers directly or indirectly from the great body of the people, it is deemed to have a republican form of government. The denial of suffrage to women by many of the states, prior to the adoption of the nineteenth amendment, did not make their governments "unrepublican." Neither does the partial substitution of direct for representative methods of legislation by means of the initiative and referendum.

WHAT THIS GUARANTEE IMPLIES.

The question of whether or not a particular state has a republican

[1] Article IV, Section 4.

form of government has sometimes been presented to the Supreme Court; and, although that tribunal has taken occasion to comment upon the meaning of the clause, it has uniformly declined to give a definitive interpretation or to decide whether the government of a particular state is "republican." The court takes the view that this is a political question, and that the decision must rest finally with the President or Congress. The latter body can discharge this responsibility through its power to determine whether senators or representatives from any state shall be allowed to take their seats in Washington. As explained earlier,[1] each House of Congress decides all questions relating to the qualifications of its own members. There is no way in which any senator or representative can take his seat if the Senate or the House refuses to let him take the oath of office. So, if Congress holds the government of any state to be unrepublican in form, it need only refuse admission to senators or representatives from that state until matters are set right. Congress, of course, is likely to be rather indulgent towards any state where "unrepublican" practices are alleged to exist, because its members, fearful of establishing precedents which might some day be used against themselves, hesitate to apply the sanction of excluding all of a state's representatives for any but the gravest reasons. Hence, in practice, a good deal of latitude is likely to be given to the definition of republican government. This, however, is not to be deplored; for any narrow definition of this term would restrain the development of state government and prevent a reasonable and legitimate amount of experimentation with political institutions.

A POLITICAL AND NOT A JUSTICIABLE QUESTION.

The Constitution also assures the states that the nation will "protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." [2] This guarantee is couched in terms sufficiently definite to prevent any serious misconception of its scope. In case of invasion, the national government's intervention does not have to be invited. Such intervention is a direct and immediate responsibility of the national authorities. But in the event of riots or other internal disorder, an express request must be made by the state authorities in the manner prescribed. As early as 1795, Congress placed on the statute book a law authorizing the President to call the militia of the various states into the national service to meet a request for intervention in a particular state; and during the nineteenth century such interventions were fairly frequent. Latterly they have been less common because the states now have

2. PROTECTION AGAINST INVASION AND INTERNAL DISORDER.

[1] See pp. 275 and 312. [2] Article IV, Section 4.

adequate forces of their own to cope with most internal emergencies.

A point to be borne in mind in this connection is that the national government may act directly in the case of local disturbances in a state, even though the state has not invited intervention and, indeed, even in opposition to the express wishes of the local authorities. National authority to intervene directly arises when the local disturbances adversely affect some national right or impede the proper exercise of some national function, such as the transmission of the mails, the control of interstate commerce, or the collection of national revenues. On this basis President Cleveland sent United States troops to Chicago during the Pullman strike of 1894, in spite of the vehement protests of Governor Altgeld of Illinois, who insisted that state authorities had the situation well in hand. The President's action in this instance was subsequently upheld by the Supreme Court.[1]

DIRECT INTERVENTION BY NATIONAL AUTHORITIES.

CONSTITUTIONAL LIMITATIONS ON THE STATES

The powers of the several states are not enumerated in the federal Constitution. To look for them there would be to misconceive the fundamental nature of that document. The Constitution, as has been said, is a grant of powers to the national government. That government may exercise all powers thus granted or properly implied from those granted. All other powers, with exceptions to be noted presently, remain where they were conceived to be originally — with the states. This point bears repetition, for despite its simplicity and importance, there is no feature of the American constitutional system so persistently misunderstood by citizens who consider themselves intelligent.

THE CONSTITUTIONAL DISTRIBUTION OF POWERS.

In reserving powers to the states, the Constitution has indicated certain express limitations or prohibitions. Some of these apply equally to the national government, but several are peculiar to the states. The prohibitions which are laid upon both the nation and the states include those relating to bills of attainder, ex post facto laws, and titles of nobility, which are everywhere forbidden. In addition, the Constitution forbids the states to enter into any "treaty, alliance, or confederation," to coin money, or to issue paper money, to make anything but gold and silver a legal tender in payment of debts, to lay any general duty on imports or exports, to keep troops or ships of war in time of peace, or to engage in war unless in

GENERAL NATURE OF CONSTITUTIONAL RESTRICTIONS.

[1] *In re* Debs, 158 U. S. 564 (1895).

imminent danger of invasion. The placing of these specific restrictions on state power was designed to prevent interference by the states with the powers committed to the national government, such as the conduct of foreign relations and the control of foreign commerce. The restrictions were also intended to render certain national powers exclusive in their nature. There are also various implied restrictions upon the states; for example, they must not lay burdens upon interstate commerce or interfere with the administration of justice in the national courts.

IMPAIRING THE OBLIGATION OF CONTRACTS.

A specific restriction upon the states which has given rise to some famous controversies is that which forbids them to pass any "law impairing the obligation of contracts." One of the earliest, and certainly the most notable, of these was the Dartmouth College Case, which came before the Supreme Court in 1819.[1] The point at issue was whether the charter of Dartmouth College, which had been granted by the crown in colonial days, was a "contract" and, hence, protected against any hostile interference on the part of the state legislature. The legislature of New Hampshire had passed a law changing the provisions of this charter, despite the opposition of the college. The Supreme Court held that "in the opinion of the court it [the college charter] is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States." The great advocate, Daniel Webster, who was an alumnus of the college, represented its interests before the court; and Chief Justice Marshall wrote the court's decision. It aroused a storm of protest, especially among the followers of Jefferson, who branded it as a species of graveyard government, and demanded to know whether the earth belonged to the living or to the dead.

THE DARTMOUTH COLLEGE CASE (1819).

THIS DECISION NO LONGER IMPORTANT.

But the decision in this case does not mean that when a private corporation is once given a charter it can never be taken away or changed. State legislatures, in granting charters, can make them revocable at will and virtually all of them now do so. Even if such a reservation is not made, a charter has no greater protection against the state's regulatory power than any other form of property. The state's right of eminent domain, that is, its power to take property with compensation for a public purpose, can clearly limit or extinguish a contractual obligation. Nor is such an obligation in the form of a charter a bar to the state's taxing power. Moreover, if the impairment of the obligation of a contract or corporate charter is demanded in the interests of public safety, health, or morals, the police

[1] Dartmouth College *v.* Woodward, 4 Wheaton 518.

power of the state is sufficient to alter or annul it without any compensation whatsoever.

It should be added that the rule of the Dartmouth College Case applies only to the charters of private corporations. The charters of public corporations, such as cities and towns, are not contracts and are in no case protected by this constitutional provision against revocation at the will of the state legislature. Municipalities and other local government bodies are merely agents of the state established for the more convenient administration of local functions. If they enjoy a measure of "home rule" and other forms of local autonomy, this is the result of specific limitations which are nowadays often inserted in the state constitution to restrict the otherwise unqualified discretion of the state legislature in controlling the affairs of local government and administration. Furthermore, the "contract clause" of the national Constitution does not protect a license to engage in a vocation or to practice a profession, since such a license is not regarded as a contract. Neither is its protection extended to an elective or appointive officeholder; a public office is a right or privilege which does not rest on any contract. The state legislature may abolish such offices and the holder thereof may suffer considerable potential loss of salary without the right to recover. Finally, the student should note (which he often overlooks) that the "contract clause" in the national Constitution applies only to the states; as far as this clause is concerned, Congress is not prohibited from passing a law impairing the obligation of a contract.

DOES NOT APPLY TO PUBLIC CHARTERS AND OTHER PRIVILEGES.

Another significant limitation which the national Constitution places upon the states is to be found among the provisions of the fourteenth amendment. This is the stipulation that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This is really a series of limitations; and in the years which have elapsed since their insertion in the Constitution just after the Civil War, they have had a most interesting history. Their general intent is plain enough. The Negro had been set free, and these provisions were intended to protect him against hostile discriminations by future laws of the southern states. So clearly was this purpose understood, that not long after the adoption of the amendment, the Supreme Court expressed doubt "whether any action by the state not directed by way of discrimination

LIMITATIONS IN THE FOURTEENTH AMENDMENT.

THEIR PURPOSE AND SCOPE.

against the Negroes as a class or on account of their race" would ever be held to be an infringement of its provisions.[1]

NEW INTERPRETATION RESULTS IN FLOOD OF LITIGATION.

Yet strangely enough, during the past seventy years, the Negro has rarely benefited from this solicitude. The Supreme Court presently resolved its own doubts by ruling that "everyone everywhere," including corporations, was included among those entitled to the equal protection of the laws.[2] The same development occurred in the case of the "due process" clause of the amendment. As a result, the court's docket began to be filled with the appeals of corporations against alleged discriminations on the part of the various states, while the Negro, for whose particular benefit the amendment had been provided, virtually dropped out of the picture. In due course the fourteenth amendment became the basis of most of the appeals taken to the court to test the constitutionality of state legislative action. Since 1875, many hundreds of decisions have been rendered to elucidate its meaning and only rarely have these decisions related to alleged discrimination against Negroes. Most of the cases have involved appeals by corporations against attempts of state legislatures to place restrictions upon them.

THE DUE PROCESS CLAUSE IN THE STATES.

Due process of law is undoubtedly the most effective single guarantee of individual liberty in the Constitution of the United States. Its meaning has been defined earlier on these pages.[3] In judicial theory its significance is the same whether reference is made to it in the fourteenth amendment or in the fifth amendment, where it serves as a limitation on the national government. Nevertheless, in practice, the clause is a more important governmental limitation in the fourteenth amendment than in the fifth, simply because it is applied far more frequently to the states than to the national government. This condition may be ascribed in part to the fact that there are more state laws than national laws and more state courts than national courts. Moreover, despite the growing centralization of economic power in the national government, it is still true that state laws affect the liberty and property of individuals and corporations more directly and more intimately than national regulations.

THE MEANING OF EQUAL PROTECTION.

Equal protection of the laws, the second state limitation in the fourteenth amendment, does not require that all individuals or corporations shall be treated alike by the laws of the state. What the clause forbids is unreasonable or arbitrary classification which favors one individual group or class against others.

[1] Slaughter House Cases, 16 Wallace 36 (1873).
[2] Santa Clara Co. *v.* Southern Pacific Co., 118 U. S. 394 (1886).
[3] See p. 520.

It merely insists that when any distinction is made by law between different classes of individuals or corporations, it shall be based upon some reasonable ground and shall not be of the nature of an unfair discrimination. It is proper, for example, to restrict certain professions, such as teaching or the practice of the law, to citizens as against aliens, or to residents of the state as against nonresidents. It is permissible to restrict certain occupations, such as that of motormen on street railways, to persons of the male sex. It is allowable to make rules relating to one class of industries but not to others, provided the classification is a reasonable one and warranted by actual conditions in the respective industries. Coal mining, for instance, may be singled out from other hazardous occupations and required to observe special safety standards. Indeed, the mining of anthracite may be distinguished from the mining of bituminous coal and separate regulations applied to each. The courts have even justified the segregation of races by holding that the equal protection clause is not violated if the state requires "separate but equal" accommodations for Negroes on trains or other conveyances.

Hence, discriminations between individuals, corporations, or establishments, when there is a relevant and reasonable differentiation between them in fact, are not regarded as denying the equal protection of the laws. But where the laws of a state, or a municipal ordinance, are obviously designed to impose a disability upon certain persons, corporations, or establishments, while giving immunity therefrom to others whose position is substantially similar, or where there is an arbitrary exclusion by law of a class of persons from some right or privilege, then the equal protection clause may be invoked. Thus, a state may not impose a penalty upon railways for nonpayment of debts which is not imposed upon other delinquent debtors; nor may a state exclude persons from participating in a primary election on the ground of race or color.[1] The lengths to which the Supreme Court will sometimes go to prevent arbitrary discrimination under the equal protection clause is illustrated by its annulment in 1886 of a San Francisco ordinance, which required all persons who wished to establish and operate laundries in frame buildings to secure a license. Though apparently reasonable, it was clearly aimed at Chinese laundries and was enforced in a discriminatory way; hence it was declared unconstitutional. The reasoning of the court on this occasion is summed up most succinctly in a single paragraph:

THIS REQUIREMENT PREVENTS DISCRIMINATION.

> Though a law be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand,

[1] Smith *v.* Allwright, 321 U. S. 649 (1943).

so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[1]

INTERSTATE COMITY

INTERNATIONAL AND INTERSTATE COOPERATION.

Among sovereign nations questions are constantly arising the solution of which requires their cooperation. These questions may involve the private rights of each other's citizens or certain public rights and duties which nations owe each other. International law, or treaty, or international comity, usually prescribe how these controversies shall be settled; although far too often, as the past two generations have shown, nations resort to war for their solution. In our federal system, problems also arise which require some form of interstate comity or cooperation for their settlement. And although, as we shall see, a good deal of this cooperation is of an informal nature, most of it is precisely defined in the national Constitution, which sets up some positive obligations which one state owes another.

THE FULL FAITH AND CREDIT CLAUSE.

The first of these obligations relates to the giving of full faith and credit. Questions involving the status of persons or their property rights often arise in one state which involve action under the laws or judicial decisions of another. To resolve such questions, the Constitution has prescribed that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."[2] Thus, when a civil issue has been tried by the courts of one state, the judgment will be recognized and enforced by the courts of every other state without a retrial of the issue. The person who holds the judgment can enforce it in another state as soon as he proves that it was rendered in his favor by a court of competent jurisdiction. The same rule holds for a marriage. If legally contracted in one state, it is held to be valid in all other states, however different their rules may happen to be. So with deeds, mortgages, wills, or other legal papers. The laws of Massachusetts require that a will shall be attested by three witnesses, each of whom shall sign in the presence of the testator and of one another. California, on the other hand, requires only two witnesses. But a will made in the latter state, by a resident thereof, and attested by only two witnesses would be held valid in Massachusetts. Property in Massachusetts would pass under such a will. The same is true of contracts. The *lex loci con-*

HOW IT OPERATES.

[1] Yick Wo *v.* Hopkins, 118 U. S. 356 (1886).

[2] Article IV, Section 1.

tractus, or law of the place of the contract, governs the making of it. If valid there, the courts of every other state will lend their aid towards having it carried out. It can readily be seen, therefore, that the full faith and credit clause is one of the most important provisions in the national Constitution. Without it, the utmost confusion would prevail.

THE RECOGNITION OF DIVORCE DECREES.

In the matter of divorces, the full faith and credit clause has had the greatest strain put upon it. Divorces are granted in different states under widely varying conditions. One state, South Carolina, allows no divorces to be granted by any of its courts for any reason whatsoever, and a few other states maintain rules so strict that divorce decrees are infrequent. Others, again, let people obtain them more easily, while one or two states (Nevada for example) have regulations of the most lenient sort. They give decrees on grounds which would not serve in most of the other commonwealths. Yet despite this ridiculous ease with which it may sometimes be obtained, a decree of divorce, when granted to bona fide residents by a court having rightful jurisdiction in any state, is held to be valid in every other state.

THE RULE AS TO RESIDENCE.

The Supreme Court, however, has laid down some rules as to the essentials of rightful jurisdiction. If a court grants a divorce decree in a state where the two parties have lived as husband and wife, there is no question that the divorce must be accepted in every state of the Union. The Supreme Court has also held that a divorce is binding in all states if granted by a court of competent jurisdiction in a state where the plaintiff is a *bona fide* resident, provided certain formalities have been complied with in the way of giving notice to the defendant. It is because of this latter ruling that hostelries and dude ranches in and near Reno shelter so many guests who are acquiring a legal residence in Nevada to take advantage of that state's lenient divorce laws.

POSSIBILITIES OF CONGRESSIONAL ACTION.

But, in spite of these requirements, the obligatory recognition of divorce decrees, so easily obtained in a few states, has been unfair to all the others, which are striving to maintain respectable standards. It is unfortunate that the whole matter of determining the legal grounds of divorce and regulating the procedure in such suits was not given to Congress at the outset, so that it could be dealt with uniformly throughout the country. Even now it would be possible for Congress to introduce some standards into the situation and, indeed, regularize the whole process by which states grant full faith and credit to the proceedings, acts, and records of other states; for the Constitution clearly states that "Congress may by

general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." [1] Unfortunately, up to the present time, Congress has not seen fit to take any action.

THE EXTRADITION OF CRIMINALS.

Although the states of the Union must recognize and give effect to the civil judgments of other states, they do not recognize criminal judgments; nor do they attempt to punish persons for crimes committed in another state. Instead, the Constitution requires them to return an accused or guilty person to the state from which he fled. The appropriate provision in the Constitution reads as follows:

> A person charged in any state with treason, felony, or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.[2]

This process of delivering up fugitives from justice is known as interstate rendition. The basic principle involved is that a person shall always be tried and punished by the government having jurisdiction over the place where he is alleged to have committed the crime and whose authority he flouted.

EXTRADITION AMONG NATIONS.

The same principle is involved when one sovereign nation returns a fugitive from justice to another nation from which he fled, a process known as international extradition. This process is based on treaties and is governed by the general limitations contained in these treaties. For that reason, an offender cannot be extradited from one country to another unless his offense is one of those enumerated in the treaty which has been concluded between them. An accused person, moreover, if he be extradited for one crime, may not be placed on trial for some different offense. It is usual to provide in certain extradition treaties, again, that a nation shall not be required to surrender persons who are charged with political misdemeanors. Subject to these limitations, a criminal, or accused person, who makes his escape from the United States to a foreign country can now be extradited or brought back. The procedure is to send a request through the department of state at Washington accompanied by various documents showing the nature of the charge against the individual whose extradition is sought. These papers go to the other country through the regular diplomatic channels.

The surrender of fugitives by one state to another is based on the national Constitution and not on treaties. Hence, there is no detailed enumeration of the crimes for which the return of an accused person may

[1] Article IV, Section 1.

[2] Article IV, Section 2.

be requested. The words of the Constitution are "treason, felony, or other crime" — which is a very broad category. Nor is there any rule against extraditing a fugitive on one charge and trying him upon another. On the other hand, no person may be brought back from one state of the Union to another unless he is actually a "fugitive from justice," as the words of the Constitution expressly require. A state cannot demand the return of anyone who was not actually within its jurisdiction at the time the offense is alleged to have been committed.

DIFFERENCES BETWEEN INTERNATIONAL AND INTERSTATE EXTRADITION.

This limitation has given rise to some interesting questions. If a man commits a murder in Vermont and escapes into New Hampshire, the matter is clear enough; he is a fugitive from justice and can be brought back. But suppose a man, standing near the boundary line of Vermont, fires a shot which kills somebody on the New Hampshire side of the border. Can he be tried in Vermont? Not for killing anyone, for nobody was killed in Vermont. Can he be extradited to New Hampshire and tried there? No, because he is not a fugitive from that state. Or suppose someone sends a booby trap through the mails from New York to Chicago. The recipient opens the package, and that is the last seen of him. The sender is discovered and arrested. Can he be tried for murder, and if so, where? Are the Illinois authorities entitled to demand his surrender to them? What about the aviator who drops a missile on a crowd in Baltimore while making a flight from Washington to New York? Is New York under obligation to honor a request for his extradition to Baltimore as a "fugitive from justice"? Admittedly, these are extreme hypothetical cases; but they indicate that the rendition clause of the Constitution has some puzzles in it.[1]

SOME LOOPHOLES IN THE LATTER.

The procedure in securing the return of anyone who is really a fugitive from justice is simple enough. Legal proceedings are started in the state where the offense was committed, and an indictment is obtained. The arrest of the accused person, wherever he happens to be, is arranged for. Then a requisition, signed by the governor of the demanding state, is taken by a police officer to the governor of the state in which the offender has taken refuge. If this requisition is found to be in proper form, it is honored by the latter and the prisoner is handed over to the officer to be taken back.

PROCEDURE IN INTERSTATE RENDITION.

Occasionally an accused fugitive, through his counsel, resists rendition, in which case the governor holds a hearing to determine whether the requisition ought to be honored. He may refuse to honor it on the

[1] Some of these hypothetical cases might bring the national government into the picture; this is especially true of the one involving criminal use of the United States mails.

ground that the charge is a trumped up one, or because he feels that the prisoner, if surrendered, will not receive a fair trial, or on some other ground. Not many years ago a New Jersey governor refused to honor a requisition from the state of Georgia to return a convict who had fled from a Georgia "chain gang," apparently because the governor considered Georgia's treatment of its convicts inhumane. Whenever rendition is refused, the fugitive is safe so long as he stays where he is, or so long as the governor does not change his mind, or a new governor with different opinions does not come upon the scene; for there is no way of forcing a governor's hand. True, the words of the Constitution are "shall be delivered up"; but the Supreme Court has decided that it cannot issue a writ of mandamus to a governor in such matters, even though his action may appear to be a gross abuse of the executive discretion.[1] So, while the obligation to surrender a fugitive from justice is mandatory in form, it is discretionary if a governor chooses to make it so.

MANDATORY IN FORM BUT DISCRETIONARY IN FACT.

Still another principle of interstate comity, directly affecting the welfare of individuals, which the Constitution expressly defines, is to be found in the provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." [2] This somewhat ambiguous statement is a guarantee that no state of the Union will discriminate in favor of its own citizens against a citizen of any other state. It cannot prevent him from coming into its jurisdiction for business or recreational reasons; it must grant him the same civil rights that it grants its own citizens, including the right to own property and to secure the protection of its courts. Should he take up permanent residence and thereby automatically acquire citizenship in the state under the terms of the fourteenth amendment, it must accord him all political rights and other special privileges reserved to its own citizens on terms identical to those prescribed for its existing citizenry. This provision of course applies only to citizens who are natural persons (or individuals); it does not apply to corporations, or artificial persons as they are sometimes called. Some states have occasionally violated the spirit if not the letter of this guarantee in barring visitors from other states on the ground that they might become public charges; but the courts have generally frowned on such a practice. In a country where the penchant for moving about is as firmly established as in the United States, the significance of this provision of the Constitution can hardly be overestimated.

THE PRIVILEGES AND IMMUNITIES CLAUSE.

DOES NOT APPLY TO CORPORATIONS.

[1] Kentucky *v.* Dennison, 24 Howard 66 (1861).

[2] Article IV, Section 2.

OTHER FORMS OF FEDERAL COOPERATION

Cooperative action among the states and between the states and the national government, which the Constitution expressly enjoins, does not preclude similar activities which may be carried on informally or which result from changed interpretations of the Constitution itself. The growing sense of national unity and the increased demand for national standardization in many directions makes such cooperation imperative, if we are to avoid the alternative of an even greater degree of centralization of authority in the national government than has taken place during the past half century.

NEED FOR INFORMAL COOPERATION.

As between the states and the government at Washington, this cooperation is often purely informal. Without being required to do so by the laws or the Constitution, the states aid the national government materially in executing many national policies locally, thereby making an expanded national bureaucracy unnecessary. The states have honored the request of the Washington authorities for their cooperation in providing relief to the unemployed, preventing violations of the national laws (e.g., against counterfeiting), handling epidemics, and giving aid in time of disaster or economic emergency. During World War I the governors of the states, at the request of the national government, organized the civilian draft boards to administer the selective service system. A similar request was honored in World War II. In addition, during the latter conflict, the states took over many activities connected with rationing, civilian defense, recruiting, the distribution of manpower, and the wartime scrap and conservation drives. Their voluntary services were largely responsible for the success of much of this activity during our wartime emergencies.

VOLUNTARY ASSISTANCE BY THE STATES TO THE NATIONAL GOVERNMENT.

In the case of many of the normal peacetime activities of government, joint action by the states and the nation has actually ripened into a partnership which may eventually develop into an entirely new type of federalism. Through the system of grants-in-aid, discussed on an earlier page, national and state governments share the cost of trunk highways, vocational education, various aspects of national defense, and the social security system adopted in 1935. Reforestation and irrigation projects have been similarly handled in the past and there is talk at present of extending this sort of partnership to the realm of general education, hitherto a responsibility of the states and their local governments.

THE GROWTH OF NATIONAL-STATE PARTNERSHIP.

Likewise, the states and the nation have joined hands in financing emergency public works as a measure of unemployment relief. In some cases, while the national government has provided most or all of the funds, the states have supplied the projects and supervised the work. As an emergency arrangement, this has proved practicable; but it is doubtful whether, as a long-range plan, one government can furnish the money while another administers the spending of it. Theoretically, such an arrangement is possible, with the national government merely laying down the general rules and the states performing the function of detailed administration and management. Thus, centralization of control would be combined with decentralization of management. But, as a matter of practical politics, such an arrangement is full of difficulties. These arise, in the main, from the fact that the national and state governments are controlled from time to time by different political parties, both seeking to obtain as much patronage as they can. To expect that a national administration will forego these opportunities, in order that its political opponents in many of the states may profit from such abstinence, is to expect a great deal more than the traditions of American party warfare would justify. Nevertheless, there is little reason to doubt that the partnership embodied in the traditional grant-in-aid principle will continue to expand as time goes on.

DIFFICULTIES INHERENT IN NATIONAL SUPPORT OF STATE PROJECTS.

Informal cooperation among the states themselves has likewise attained in our generation a volume and significance which too few students of government have realized. Interstate commissions have been established to make recommendations for overcoming tax conflicts, to deal with the problem of interstate crime, and common problems relating to the administration of social security. These recommendations serve as a guide to the various state legislatures and administrative officers. Since 1892, moreover, a National Conference of Commissioners on Uniform State Laws, consisting of representatives of every state, has been recommending model statutes to the various legislatures on a great variety of subjects concerning which it is desirable to have a uniform policy.

VOLUNTARY COOPERATION AMONG THE STATES.

The coordinating body for most of these agencies on interstate cooperation is the Council of State Governments, which came into being in 1935, and derives its authority from commissions on interstate cooperation appointed by the legislatures of the states. One representative of each of these commissions makes up the policy board of the council which meets every

THE COUNCIL OF STATE GOVERNMENTS.

six months. The council's administrative headquarters are in Chicago. In addition to its planning and research activities, the council serves as a clearing house for several other interstate bodies such as the National Association of Attorneys General, the National Association of Secretaries of State, and the Governors' Conference. The research activities and facilities for collaborative action furnished by the council and its affiliated agencies are in a measure responsible for the well-planned and concerted attack which many states have announced they are prepared to make in the wake of World War II upon common problems in the fields of education, employment, agriculture, housing, and social services.[1]

INTERSTATE COMPACTS OR AGREEMENTS.

An instrument to promote common action among various states which is being used with increasing frequency is the interstate compact. This is a formal agreement among interested states to settle a dispute or carry forward some project the scope of which transcends the jurisdiction of any one state. Authority for forming such compacts, somewhat negatively stated, is to be found in the constitutional provision which says that "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State." [2] Many such compacts have been concluded, more than twenty-five of them having been either initiated or ratified by Congress in the past fifteen years. Some of these compacts relate to boundary questions. Others relate to the diversion and use of waters of interstate lakes and streams, the prevention of pollution in rivers and harbors, and flood control. Still others provide for the interstate supervision of criminals out on probation or parole, or relate to the building of bridges and other structures on interstate waters, as well as to the conservation of fisheries and other natural resources.

SOME RECENT COMPACTS.

Among the more important recent compacts are those which concern the use and diversion of the waters of two of the nation's great river systems, the Colorado and the Columbia. Seven southwestern riparian states signed the Colorado River Compact between 1925 and 1939; four northwestern states signed the Columbia River Compact, an agreement closely connected with the construction of the Grand Coulee and Bonneville dams. By means of a compact, New York and New Jersey have created a common port authority to develop New York harbor; similarly they have agreed to the joint development and management of the Palisades Interstate Park, an area of some 44,000 acres along the Hudson, including the picturesque

[1] The Council of State Governments publishes biennially *The Book of the States*, an invaluable source of information on current developments in state government and administration.

[2] Article I, Section 10.

Palisades, and running from Fort Lee, New Jersey to Newburgh, New York.

A DEVICE FOR SOLVING REGIONAL PROBLEMS.

The possibilities of regional administration of matters falling into the jurisdiction of several states, inherent in the device of the interstate compact, have by no means been exhausted; and there are many who look to this device as a means of taking care of the growing number of problems which require a regional solution. Others, however, consider the device quite inadequate for the purpose. As technical efficiency goes ahead, with its changes in transportation, communication, industrial organization, marketing, and the routine of daily life, there will be more and more problems which the individual states cannot hope to handle effectively. National unity having been attained, and the old-time fear of national tyranny diminished, the march of centralization, with its piling up of legislative and administrative authority at Washington, seems bound to continue, unless some more formal instrument for regional government and administration is perfected.

MORE ELABORATE PROPOSALS FOR REGIONAL GOVERNMENT.

Accordingly, it has been suggested that we ought to establish a number of regional commonwealths in the United States. New York, with her twelve million people, might stand alone as one region, New England as another, the South Atlantic seaboard as a third, etc., thus giving the nation some nine or ten regional commonwealths in all. Each of these, it is suggested, should have its own regional legislature and perhaps an elective governor general as its chief executive. Certain powers now vested in Congress might be devolved upon these regional governments and various powers now reserved to the states handed over as well. Thus, the new regional commonwealths would obtain their endowment of authority from two sources, from above and from below. The states could be maintained in existence with most of their present powers intact, but they would surrender to the new regional governments some of the authority over economic and social relations which they are no longer able to exercise in an effective way.

All this would require, of course, a series of amendments to the national Constitution; and, as a practical matter, such a plan would encounter serious obstacles. No government ever shows itself willing to surrender any of its powers. On the other hand, it is becoming reasonably clear that our two-cylinder governmental machine will some day prove inadequate to carry the load, if the present rate of increase of governmental functions is continued. In point of governmental importance, the states are clearly getting smaller, the nation larger. The gap between the two has been

widening with startling rapidity during the past few years. Those who deplore this inevitable drift of power, and demand that the national government desist from its steady assumption of authority at the expense of the states, are fighting a lost cause unless they can suggest a satisfactory alternative. The helplessness of the states was all too vividly shown, for example, when the banking system collapsed in 1933. Power cannot, and will not, be devolved into hands which are from the very nature of things incapable of using it competently. The only alternative to excessive national centralization, therefore, is some workable scheme of legislative and administrative devolution.

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CHAPTER XXXVII

THE STATE CONSTITUTIONS

No philosopher's stone of a constitution can produce golden conduct from leaden instincts. — *Herbert Spencer.*

THE STATUS OF STATE CONSTITUTIONS.

Each of the forty-eight states has a constitution as the basis of its government. This constitution is the fundamental law in accordance with which the state government is organized and carried on. All the thirteen original states adopted their first constitutions before the national convention met at Philadelphia in 1787. Since that date thirty-five other states have been admitted to the Union, each with its own constitution in readiness at the time of admission. Every state has the right to make and unmake its own constitution at will, provided it does not run counter to any provision in the Constitution of the United States. This means, for example, that no state constitution can authorize the coining of money, or the establishment of a state postal service, or the taking of private property for public use without just compensation. Each state determines for itself the procedure by which its constitution shall be framed and amended — whether by a constitutional convention, by the legislature, or by direct action of the people through the initiative and referendum.

HOW A STATE CONSTITUTION IS MADE.

The usual method of framing a state constitution is to call a convention for that purpose. Almost two hundred such bodies have been called together in various states since the Revolution. The procedure in most states (but not in all of them) is as follows: The state legislature, when it sees fit or when required to do so by the existing constitution,[1] refers to the people the question whether a constitutional convention shall be called. It puts this question on the ballot at a state-wide election. Or the question, in some states, may be put on the ballot by an initiative petition.[2] In either case,

[1] In some states the question of calling a convention must be submitted to the people at stated intervals — every seven, or ten, or sixteen years — irrespective of any action by the legislature. This is now the rule in eight states: Iowa, Maryland, Missouri, Michigan, New Hampshire, New York, Ohio, and Oklahoma.

[2] See p. 665.

if the people vote in the affirmative, an election is held to choose the members of the convention. As a rule, they are elected by senatorial or assembly districts, but some are occasionally chosen by the voters of the whole state. The size of the convention is sometimes fixed by the existing constitution, but more often that question is left to be determined by the state legislature. Normally the convention has at least a hundred members, and sometimes two or three hundred. All of them sit together in one body. A constitutional convention does not have two chambers like a legislature.

THE CONVENTION.

In due course the delegates assemble at the state capitol, ordinarily at a time when the legislature is not in session. This enables them to use the legislative chambers. The delegates then elect their own presiding officer, appoint various committees, and proceed to the only business of the convention, which is that of preparing the draft of a new constitution or suggesting amendments to the existing one. Proposals are filed, like bills in a legislature, and are referred to the appropriate committees. The various sections of the existing constitution are also apportioned among the committees for such revision as they may recommend.[1] The committees hold hearings and make their reports to the convention, which then proceeds to deal with them as a legislature would do. It puts them on the calendar, debates them in committee of the whole, and votes to accept or reject them.

CONVENTIONS AND LEGISLATURES COMPARED.

The superficial resemblances between a constitutional convention and a legislature are so obvious that the more fundamental differences between the two are apt to be overlooked.[2] A legislature is avowedly a partisan body; its members are usually divided into two well-defined party groups, each committed to the carrying out of a party program. In a constitutional convention party lines are not so sharply drawn. Often the delegates are elected on ballots which bear no party designations. Compromises are more frequent, for the constitutional convention is above all things a deliberative body. Of itself it can take no final action. All that it does must go to the people for ratification.[3] Compared with a legislature, the num-

[1] Sometimes, in advance of the meeting, a commission is appointed to prepare data and information for the convention, or to suggest changes in the constitution, or even to prepare the entire draft of a new constitution as an aid to the convention in its work. Such a commission is sometimes authorized to submit its draft directly to the state legislature which can then, if it sees fit, submit the proposals to the voters, thus obviating the need for a constitutional convention altogether. For a discussion of these commissions see Harvey Walker, *Lawmaking in the United States* (New York, 1934).

[2] For a full discussion of this subject, see *The Procedure of Constitutional Conventions* (Bulletin No. 1, Massachusetts Constitutional Convention, Boston, 1917).

[3] There are occasional exceptions to this. A few state constitutions have been put into effect without popular ratification.

ber of matters with which a constitutional convention has to deal are relatively few, and they touch the fundamentals of government. They are not matters of routine or detail.

SOME IMPORTANT DIFFERENCES.

The rules of a legislature, moreover, are designed to expedite business, while those of a constitutional convention aim rather to afford the fullest opportunity for careful deliberation. The work of a legislature, again, is restricted by the state constitution. But conventions are not usually restricted in this way. Nevertheless, if the state constitution contains limitations upon what the convention may do, the latter must stay within these limits. A convention is also subject to limitations which are implied in the nature of its functions. Its job is to frame a constitution, not to appropriate money or try to run the state government. Finally, the members of a legislature are elected for a designated term, while the delegates in a constitutional convention are chosen to perform a specified task and are not customarily restricted as to the time in which they shall accomplish it. In fact it is a debatable question whether the legislature, in calling a constitutional convention, can impose a time limit or any other limitation upon the latter, unless the existing state constitution authorizes it to do so.

RATIFICATION BY THE PEOPLE.

When the convention has finished its work, the provisions of the new constitution (or the group of amendments to an old constitution) are then submitted to the people of the state at a regular or special election. There are some practical advantages in submitting amendments rather than a new constitution. When the convention submits a new constitution, the people have no option but to accept or reject it as a whole. Every voter who objects to any provision in it then votes *No*, and this cumulative opposition is usually enough to ensure its defeat. New York afforded a good illustration in 1915. There the constitutional convention did a good piece of work on the whole, but it adopted a few provisions which aroused strong opposition in various quarters. And, inasmuch as people usually vote their resentment rather than their appreciation, they decided to reject the whole document.

The Nebraska convention of 1920, on the other hand, submitted forty-one separate amendments, most of which were ratified at the polls. This method affords each amendment an opportunity to stand or fall on its own merits. It is possible, of course, to combine both plans — to submit both a new constitution and a series of amendments containing the controversial provisions. This makes it possible for the voters to adopt a new constitution and at the same time choose the amendments which they want added to it.

When the people desire merely to amend their state constitution,

without undertaking a general revision, it is not necessary or even customary to call a convention of delegates. With the single exception of the constitution of New Hampshire, all state constitutions provide for methods of amendment which are relatively simple. They allow the legislature (sometimes requiring more than a majority vote, and sometimes requiring that the resolution be passed more than once) to submit proposals of amendment. Except in Delaware, where favorable action by two thirds of the members of two successive sessions of the legislature is sufficient to enact an amendment, proposals to amend go on the ballot, and if accepted by the voters become a part of the constitution. Usually a bare majority of the voters who vote upon the proposed amendment is sufficient, but in some states special majorities are required. Tennessee, for example, demands a majority of the votes cast for members of the legislature to sustain an amendment; Wyoming requires a majority of its entire registered electorate.

HOW STATE CONSTITUTIONS MAY BE AMENDED.

1. BY LEGISLATIVE PROPOSAL AND POPULAR RATIFICATION.

At least seven state constitutions require that a majority voting at the particular election in which an amendment is placed on the ballot shall support the proposal in order to validate it. The latter requirement, of course, means that the ballot of everyone who votes for candidates at the election, but does not vote on the question of adopting the amendment, is counted in the negative. An amendment may easily be defeated by this requirement because many voters mark their ballots for the candidates at a regular election and pay no attention to anything else. A defeated amendment can be proposed a second time, but sometimes it may not be resubmitted until after a designated lapse of time — four, five, or six years. Occasionally, too, the existing constitution restricts the number of amendments which the legislature may submit to the voters at any one election. The constitution of Indiana, for instance, limits the number of proposals to two.

The other method of amending a state constitution is by the use of the initiative petition. This procedure will be more fully discussed in a later chapter; it may suffice here to say that, in at least thirteen states, the voters may propose a constitutional amendment by means of a petition setting forth their proposal. If this petition bears the requisite number of signatures (sometimes as many as fifty or a hundred thousand of them), the proposal goes by referendum to the people, without any affirmative action of the legislature being necessary, and if adopted at the polls becomes a part of the constitution. The initiative method allows the

2. BY THE INITIATIVE AND REFERENDUM.

submission of several amendments on the same ballot, and at every election various amendments are thus submitted in the states which permit this procedure.

GENERAL NATURE OF STATE CONSTITUTIONS.

State constitutions display considerable variation. The oldest among them are to be found in the New England states. Nominally, at least, that of Massachusetts is still the original document adopted in 1780 although it has been greatly changed by successive amendments. The newest of the state constitutions is that of Missouri, adopted in 1944. All the state constitutions are longer than the national document, but some of them are much longer than others. The constitutions of Vermont and Rhode Island are the shortest, with less than six thousand words, occupying some ten or eleven pages; those of Louisiana and California are among the longest, the former having more than sixty-three thousand words — enough to fill a two-hundred-page volume. Whenever a new constitution is adopted, it is reasonable to assume that it will be longer than its predecessor. Consequently, it is a safe generalization that the constitutions most recently adopted are the most elongated.

THEIR STEADY EXPANSION IN SIZE.

The inclusion of more and more details in constitutional documents and their consequent steady lengthening has been a consistent process from the beginning. The first state constitutions were short and simple — that of Virginia, adopted in 1776, contained only about three thousand words. And down to the Civil War period there was no considerable expansion. During the past eighty years, however, the constitutions have been including all sorts of administrative details and have come to resemble veritable legal codes. Some of them now fix the salaries of state officers (even subordinate officers) and prescribe their duties in detail. They contain all manner of provisions relating to the management of schools, the regulation of banks, the control of public utilities and of other corporations, the budget, the government of cities and towns — even the methods of taxation and assessment. They sometimes contain specific regulations of such matters as hours of labor, workmen's compensation, and minimum wages, not to speak of pensions for public employees and the status of chiropractors. The constitution of Oklahoma, for example, goes into such minute detail as to provide that domestic science must be taught in the public schools.

REASONS FOR THE EXPANSION.

Two or three reasons account for this steadily growing prolixity. One is the fact that the functions of state government are expanding, and, to a certain extent, the constitution must expand with them. As the pyramid enlarges, the base must broaden. But the elaboration of state constitutions also betrays a waning

public confidence in the wisdom and integrity of legislators. The makers of state constitutions are more and more inclined to look upon these documents as essential safeguards against legislative incapacity, favoritism, and corruption. Some of the newest constitutions have thus become reiterated decalogues of Thou Shalt Nots.

Finally, the elaboration of these constitutional provisions is in some measure a mark of public dissatisfaction with the decisions of the courts. When a constitutional convention assembles, there is always a recital of specific grievances (on the part of labor, or the farmers, or the municipalities, or the public employees) due to what are regarded as unjust judicial decisions. To prevent such rulings in the future, various remedial provisions are proposed and many of these are lobbied through the convention. Taking one consideration with another, therefore, a convention finds that the constitution has grown considerably in size by the time its work is finished.

SOME EFFECTS OF IT.

This practice of crowding a multitude of detailed matters into the state constitutions has been unfortunate in its results. It has multiplied the opportunities for lawsuits and has tended to give a legalistic tone to all discussions of social policy. Details, when placed in the constitution, shackle the hands of both legislators and courts. The more voluminous a constitution, the more quickly it loses touch with the social and economic needs of a growing community. The more detailed and rigid the provisions of a constitution, the greater are the obstacles in the way of prompt alteration and the reform of abuses. The federal Constitution has been a marvel of adaptability because its provisions are brief, broad, and general. Its framers were wise enough to leave it silent on all matters which could be trusted to work themselves out in the process of time. The statesmen of 1787 did not clothe themselves with the mantle of omniscience. They assumed that posterity would be competent to look after its own interests. Makers of state constitutions, during the past fifty years, have not been so trustful. They have not hesitated in their attempt to fasten upon future generations the idiosyncrasies of the day.

LOSING SIGHT OF THE REAL PURPOSE.

There is danger that we may lose sight of the true purpose which constitutions are intended to serve. A state constitution is supposed to be the basis of government, not the whole superstructure. It is intended to make efficient administration easier, not to place obstacles in its way. A constitution should provide the various branches of state government with an adequate endowment of power and trust them to use it properly. Too often, however, it surrounds them with a picket fence of prohibitions and restraints. In a

word, the constitution should take for granted that the people's representatives will usually do the right thing if they are given a chance. Only by starting with such an assumption can democratic government function successfully.

What does a state constitution contain? First, there is usually a bill of rights — a series of general guarantees and limitations designed to safeguard the liberties of the citizen. This does not always come first among the provisions of the constitution (it more often comes last), but historically it is the oldest feature. To a considerable extent these guarantees and limitations merely repeat the safeguards which are contained in the first ten amendments to the national Constitution. But the newer state constitutions contain various additional guarantees, although, as a practical matter, most of them are superfluous. They guarantee to the citizen various rights that neither legislatures nor courts have ever sought to take away and could not take away if they tried. It is merely that we have acquired the habit of injecting into the state constitution divers venerable platitudes concerning human equality, the rights of man, freedom of speech, freedom of the press, freedom of religious belief, freedom of assembly, the right of petition, the dignity of labor, the aspiration for social justice, liberty, and peace, the value of education, the duty of law observance, and the sanctity of the citizen's home.

WHAT A STATE CONSTITUTION CONTAINS:

1. BILL OF RIGHTS.

Second, a state constitution makes provision for the frame of government. It stipulates how the governor, the higher officials of state administration, and the members of the state legislature shall be chosen. It sets forth their various powers and the relations of each to the others. It provides for the organization of the courts. It makes stipulations as to the mechanism of local government in counties, cities, towns, and townships. Finally, it contains provisions relating to such matters as impeachments, the militia, taxation, borrowing, budget procedure, public institutions, the public health, and education. Suffrage and elections also commonly occupy a chapter. State constitutions, by the way, are usually divided into chapters or articles; these, again, are subdivided into sections, and sometimes the division is carried further into subsections.

2. PROVISIONS FOR THE FRAME OF GOVERNMENT.

3. MISCELLANEOUS SECTIONS.

As a device for shortening state constitutions the administrative code has been suggested. According to this proposal the constitution would deal only with the fundamentals of state government. Anyone who desires to know what is meant by this restriction to fundamentals need only look over the national Constitution. All other matters, which now

go into state constitutions, would be relegated to an administrative code which might be as elaborate as its framers choose to make it. This code would be easier to change than a constitution, that is, it would not require an affirmative vote of the people to alter its provisions. On the other hand, it would not be as simple to amend as an ordinary statute. A two-thirds or three-fourths vote of both legislative chambers, plus approval by the governor, might be prescribed for such changes. Such an arrangement would combine protection with flexibility, and something of the sort will have to be devised if state constitutions are to be kept from inordinate expansion in size.

A SUGGESTION FOR SHORTENING CONSTITUTIONS.

Within its own sphere the state constitution is supreme. It binds the executive, legislative, and judicial branches of state government. The state legislature, in the exercise of its lawmaking authority, must respect all the limitations placed upon it by the state constitution. In case of controversy, the highest court of the state will decide whether the legislative measure in question is, or is not, constitutional. As a matter of practice, however, these courts always assume that the legislature has a power until the contrary is shown. This rule, it will be noticed, is just the reverse of that applied in interpreting the powers of the national government. Congress is not deemed to possess any power unless an actual grant of that power can be demonstrated. But state legislatures are not rigidly held to this rule by their own courts.

SUPREMACY OF THE STATE CONSTITUTION IN ITS OWN SPHERE.

Strictly speaking, the only way in which a legislature can determine whether any law is constitutional or not is to pass it and see. There is, however, a plan by which at least ten states have managed to obtain authoritative opinions in advance, and thus to guard against the passing of laws which would later be thrown overboard. This is known as the method of advisory judicial opinions. Where it is in operation, the governor, or either house of the legislature, may call upon the justices of the highest court of the state for an advance opinion upon any constitutional question which arises in connection with a pending legislative enactment. But these opinions of the justices are usually not binding upon them in case the same point should later arise in a regular suit or action at law. They are merely advisory and, being arrived at without hearing the arguments of interested parties, cannot properly be regarded as final and are not so regarded except in Colorado. Nevertheless, they are usually safe enough to follow.[1]

ADVISORY JUDICIAL OPINIONS ON CONSTITUTIONALITY OF LAWS.

[1] See also p. 735.

Several years ago a French scholar, in the course of giving a lecture on American government, had this to say: "To understand the government of the American state is a life-long task for any scholar because there are forty-eight states, every one of which has its own constitution and its own system of government — no two of them alike." Strictly speaking, he was right; but the situation is by no means so confusing as his statement would imply. It is true that the differences among the state constitutions, if all of them were put down on paper, would fill a book of a thousand pages; but the great majority of these differences are of such slight importance as to be hardly worth recording. The important thing is that the *essential features* in all the forty-eight state constitutions are substantially alike. They set up much the same scheme of government in all the states. The various states are much more nearly alike in their systems of government than in area, population, wealth, or even in political tendencies. The resemblances far outweigh the differences. Hence, the American citizen, when he moves from one state to another, does not find himself under a government which seems new or strange to him.

VARIETY AND UNIFORMITY IN STATE CONSTITUTIONS.

Take a look at these fundamental resemblances. In the first place, every state has the same status in the Union and has equal rights under the national Constitution. Every state has a government of inherent, not delegated, powers. Each is supreme within its own sphere, and has a republican form of government, a government subject to popular control. Each has a constitution through which this ultimate popular control of the state government is exercised. Every state has universal suffrage, although some limit it by the application of literacy tests and, in the southern states, most colored citizens are by one device or another debarred from voting. In every state everyone is guaranteed due process of law and equal protection of the laws. Every citizen of every state is a citizen of the United States. In all these fundamental matters the states are uniform.

OUTSTANDING POINTS OF UNIFORMITY:

1. REPUBLICAN FORM OF GOVERNMENT.

Second, all the states have substantially the same general scheme of government — based upon the principle of division of powers. In every state there is a governor, directly elected by the people, and he is vested with certain independent executive powers. In every state, moreover, except Nebraska, there is a legislature of two chambers, both of which are elected by the people.[1] And in every state there is a system of courts — usually a hierarchy of three grades — with the highest of these courts empowered to declare

2. THE FRAME OF GOVERNMENT.

[1] Since 1937 Nebraska has had a single-chamber legislature.

the unconstitutionality of state laws. The doctrine of separation of powers is recognized in all the states by giving independent functions to the executive, legislative, and judicial arms of the government. Every state has its own system of civil and criminal law, and in all of them (with the exception of the civil law in Louisiana) the common law of England forms the basis of jurisprudence; hence, the underlying legal principles are alike in all parts of the Union. That is why a lawyer who has been admitted to practice in one state can move to another without much difficulty in adjusting himself. But the English barrister who shifted his office across thirty miles of channel into France would find himself helpless.

Third, the forty-eight states are agreed on the principle that local affairs should be locally handled. Hence, all the states are divided into areas for self-government. There are counties in all of them, although in Louisiana they are called parishes. There are cities in all of them. Most of them have towns or townships. Some have boroughs as well, or incorporated villages. The detailed arrangements for local government differ widely from state to state, but the general principles are everywhere the same. For example, all areas of local government derive their powers from the state, and in all the states the officers of local government are directly under the control of the people. Every American lives under four governments — national, state, county, and municipal or rural, as the case may be. He may also live in a school district which is separate from his municipality, and perhaps in a sanitary district or road improvement or flood control district as well. One thing he never lacks is government. All these various governments insist on taxing him, however, and this sometimes dulls his appreciation of them.

3. DEVOLUTION IN GOVERNMENT.

Finally, and this is of great importance, the party system is uniform in all the states. The same parties operate in both national and state politics; they use the same names and the same methods. The voter who is a Republican when he lives in Ohio will find his party doing business in New York if he moves there. The Democrat who moves from North to South will find congenial company (and plenty of it) wherever he goes. It is true, of course, that the party lines in national and state politics do not exactly coincide, but they come fairly close to it. Political parties, as has been shown, play a very important role in the actual work of government, and their unity throughout the nation has a far-reaching influence upon politics in the states.

4. UNIFORM PARTY CLEAVAGES.

Outsiders are accustomed to overemphasize the element of variety in American state constitutions. A great deal of variety there is, to be sure,

but mostly in things that are inconsequential. In matters that really count, there is a remarkable measure of unif· mity among them all. The differences among the states are not so much in their form or methods of government as in their traditions, their point of view, and the kind of men whom they elect to govern them. The older states incline to be more conservative, and less ready to change their methods, than are the newer commonwealths of the West. Likewise, the industrial and the agricultural states look at many issues from a different angle. But when one bears in mind the great regional diversity of the United States, the marvel is not in the differences but in the similarities.

THE INCLINATION TO OVERSTRESS DIVERSITY.

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CHAPTER XXXVIII

STATE PARTIES AND PRACTICAL POLITICS

Along with constitutional government the American citizen must study the extra-constitutional system. Its body and soul are to be found in the political parties. — *M. Ostrogorski.*

Government is not merely a matter of constitutions and laws. Its momentum comes from the people acting through the agency of party organizations. And party organization in the United States is chiefly a state affair, with each state determining for itself the character of its party mechanism. Keep in mind the fact that the states decide how the election districts shall be mapped out, and what share the party organizations shall have in the election campaigns. Likewise, the system of party committees, the methods of raising and spending party funds, and many other essentials of party organization are largely determined by the state laws. In matters affecting the machinery and work of political parties, therefore, each state has a large measure of self-government.[1] The state legislatures can even prescribe how the delegates to the national party conventions are chosen, in other words, how candidates for the presidency shall be nominated.

THEORETICAL AUTONOMY OF STATE PARTIES.

This being the case, it is conceivable that each state might have developed a party system different from the others. Each might have developed political parties based upon state issues, with no reference to party organization in the other states. But that is not what has happened. Virtually the same party divisions exist in all the states, and these divisions are not largely determined by state issues. This is because the interest of the people in national policy has overshadowed their interest in matters with which the individual states have to deal. It is true, of course, that

BUT STATE AND NATIONAL PARTIES HAVE BECOME IDENTIFIED.

[1] It is true that the national Constitution gives Congress the power to modify state regulations concerning the "times, places and manner of holding elections for senators and representatives" (except as to the places of choosing senators), and that Congress has passed various laws relating to the election of its own members. Nevertheless the states retain a large amount of discretion as to the manner of conducting all elections (e.g., the form of the ballot, the selection of election officials, etc.).

now and then a single state or a group of states will pass into the control of a party organization which is based on local or sectional issues, as was the case in Minnesota and Wisconsin a generation ago, but in general the lines of party division are determined by questions of national politics. This gives the American party system a nation-wide unity, despite the fact that each state is free to go off on its own tangent if it so desires.

The reasons for this relatively close identification of state and national party lines throughout the United States are both practical and historical.

REASONS FOR THIS IDENTIFICATION.

As a practical matter it is not possible to separate state issues from national issues. What each political party stands for is not merely a program but a point of view. It cannot well be liberal in its attitude on state issues and conservative on questions of nation-wide importance. As a practical matter, again, it would be difficult to maintain two complete sets of rival party organizations, one pair based upon national and the other on local issues. As every politician knows, it takes enough energy and funds to keep a single party organization in good functioning order. All the practical considerations, therefore, tend to the consolidation of party effort under a unified command on both fronts. Historically, moreover, a reason for the identification of national and state party lines is to be found in the fact that, during the first fifty years after the formation of the Union, many national questions of great importance forced themselves to the front, while political affairs within the states commanded relatively little public interest. These national issues ranged the people into two great camps with the result that the state organizations were engulfed by the larger groups.

They have remained engulfed. Under normal conditions the allegiance of the average voter is to one of the national parties. His connection with the same party in the state is in most instances incidental to the larger allegiance. A Republican in Montana feels a kinship with a Republican in Rhode Island, three thousand miles away, although neither may know anything about the local issues which concern the other. Democrats in Savannah and in Syracuse are brothers under the skin. Occasionally, to be sure, changes occur in the party system. One of the two great parties may disintegrate, as happened in the case of the Federalist party after 1812, or in the case of the Whig party after 1856. Then, too, there are times when some new and highly controversial issue (like the League of Nations or the New Deal) upsets the old alignment and causes numerous desertions from one party into another. Likewise, it sometimes happens that a party leader of uncommon popularity manages to swing large groups of voters from the

PARTY REGULARITY.

ranks of his opponents into his own following. This has repeatedly taken place in American politics. But, in the long run, continuity of party allegiance is the rule. A new party takes over in place of an old party, as happened when the Republicans succeeded to the Whigs after 1856, and the two-party equilibrium is re-established. Or the old divisions are restored, as happened in 1916 when the Progressives, who had left the Republican camp to support Theodore Roosevelt, returned to their former affiliation. Established party lines are hard to shatter permanently because habit is the strongest of all factors in determining party loyalty. Most people, whether they admit it or not, dislike to change their accustomed ways of thought or action. They may desert the beaten path for a season but usually they drift back to it again. A political party cannot survive unless it builds up a strong quota of "regulars" in its ranks, that is, a body of dependables who stick to it through thick and thin.

Principles and platforms are a factor in making converts for the party, but not to the extent that is commonly supposed. Most voters do not know just what their party principles are, nor do they read party platforms. But many of them respond to a slogan which conveys to their minds a general notion of what the party stands for, or proposes to do. They understand (or think they do) what is prefigured by such battle cries as "back to normalcy" or "a new deal." That is sometimes as far as their thinking goes. Hence, a party and its leaders may fail to carry through the specific promises of a platform and yet retain their hold on a majority of the voters, provided the general trend of its program has been followed. In any event, few people pay much heed to what the state party programs contain. It is only the national party platforms that receive any attention at all.

SHIFTS IN PARTY ALLEGIANCE.

ORGANIZATION OF THE STATE PARTIES

How are the state party organizations constructed, and what are they supposed to do? These organizations are much alike in all the states. The central organ of the party in each state is a state central committee, made up of committeemen who are chosen directly or indirectly by the party voters. The choice is usually made either by committees or by districts, which vary from state to state; and, indeed, different parties within the same state may not use the same districts for the selection of committeemen. In any event, the state committees are made up of local party leaders, with a considerable sprinkling of professional politicians among them.

THE STATE COMMITTEE.

In general, the function of a state central committee is to see that the local party organizations are kept alive and attend to such matters as the registration of the party voters. It also has a voice in the distribution of patronage, that is, appointments and other favors, with the duty of seeing that these are used to the best advantage of the party. In a word, it is the function of a state committee to keep the whole party machine in repair and in running order. Between election campaigns the committee does not meet often; its functions during these periods of political quiescence are exercised usually by its chairman, or secretary, or both.

FUNCTIONS OF THE STATE COMMITTEE.

When the time for an election draws near, however, the committee limbers up and makes the party's campaign plans, often determining when and where the party convention shall be held, and how funds shall be raised. Sometimes it quietly hand-picks its own slate of candidates. It matters little whether the actual nominations are to be made by the convention or by means of a primary election; in either case the state committee is likely to influence the preliminary selections; and, under normal conditions, its action has a fair chance of being ratified. Then, during the campaign, the committee serves as a general board of strategy, arranging for the chief speakers, soliciting contributions, and apportioning the available money for expenses, preparing and issuing the campaign literature, etc. Most of the actual work is done by the chairman or the secretary of the committee in cooperation with the local party committees all over the state, but the committee itself usually decides all questions of campaign policy. Sometimes it even frames the party platform.

CAMPAIGN WORK.

While the chairman of the state central committee is nominally the head of his party organization in the state, he is not always the real leader or party boss. He may be the real leader, but more often he takes the chairmanship with the understanding that he will not give his full time to it or take too much responsibility. Sometimes he is largely a figurehead, the real leadership being exercised by someone who controls the committee without even being a member of it. The secretary of the state central committee is usually a paid official, an energetic worker with a capacity for handling details. Likewise, there is a treasurer, upon whom devolves the duty of helping to raise the campaign funds, paying the expenses, and finding some way to liquidate the deficit after the election is over. This last problem, it need scarcely be added, is less difficult when the party wins than when it loses. A victorious party, with patronage in its gift, rarely lacks good angels.

ITS CHAIRMAN.

Mention has been made of the state party convention. Ordinarily each party holds a convention some time prior to the state election. This convention is composed of delegates who represent the party voters in the various municipalities or districts of the state. They may be chosen by counties, districts, or by smaller areas; the method of selection is regulated either by the rules of the party or by the laws of the state. For the most part, the delegates are now directly chosen by the voters of the party at primary elections. When the convention meets, it chooses its own chairman and proceeds to business. Each party, of course, has its own convention.

THE STATE PARTY CONVENTION.

One of the primary functions of a state party convention is to draft and adopt the party platform. This is not usually an arduous task. National party platforms are often indefinite and evasive on the important issues; state party platforms are even more so. They aim to trim their "planks" into a form that will antagonize nobody. They point with pride to what the party has done, and view with alarm what the opposing party proposes. They are well studded with patriotic platitudes and replete with all manner of irrelevancies — such as pronouncements on matters with which the state government has nothing whatever to do. They may express sympathy with the aspirations of the Chinese in Asia or give approval to the "good neighbor" policy towards Latin America. One gleans from some of those platforms that India ought to have self-government, that world peace is desirable, but not by means of a super-state, and that the Jews, not the Arabs, should possess the promised land.[1] The party leaders try to agree upon a platform that will "appeal to all classes among the voters" and hence will encounter no opposition from any source. Obviously the best way to do this is to keep out of the platform everything that offends and put into it a series of resounding phrases. The possibilities of the English language, in the way of saying much and meaning little, are considerable.

THE STATE PARTY PLATFORMS.

THEIR EVASIVENESS.

Here is an example:

> Pointing to its history and relying on its fundamental principles, we declare that the —— party has the genius, courage and constructive ability to end executive usurpation and restore constitutional government; to fulfill our world obligations without sacrificing our national independence; to raise the national standards of education, health and general welfare; to reestablish a peace time administration; to restore and maintain the national credit; to reform unequal and burdensome taxes; to free business from all arbitrary and unnecessary official control; to suppress disloyalty without the denial of justice; to repel the

[1] There is no "Arab vote" in the United States.

arrogant challenge of any class and to maintain a government of all the people as contrasted with government for some of the people, and finally, to allay unrest, suspicion and strife, and to secure the cooperation and unity of all citizens in the solution of the complex problems of the day; to the end that our country, happy and prosperous, proud of its past, sure of itself and of its institutions, may look forward with confidence to the future.

THE DIRECT PRIMARY

THE CONVENTION GIVES WAY TO THE PRIMARY IN NOMINATING CANDIDATES.

In the old days an even more important function of the convention than that of adopting a platform was the nomination of the party's candidates for elective office. The party convention, it will be recalled, was the successor of the party caucus which began to go out of fashion in Andrew Jackson's time. But at the beginning of the twentieth century, the convention took its turn at losing ground as a nominating agency. It gradually gave way before the advance of the direct primary, and today only two states, Connecticut and Rhode Island, continue to have all their candidates for state elective offices nominated exclusively by this body. In all the remaining forty-six states the convention is either supplemented by the direct primary or has been entirely replaced by the latter.

OPERATION OF THE PRIMARY.

Under the direct primary system, candidates are usually required to secure the signatures of a small number of voters in order to have their names placed upon the primary ballot; and at this primary election the voters of each political party determine which of the various aspirants shall stand at the final election as the authorized party candidates. In some cases there is, at the primary, a special ballot for each party; in others, all the names are printed in different columns on the same ballot. California permits what is known as "cross filing," that is, a candidate is permitted to have his name on the primary ballot of more than one political party. And not infrequently he has been able to win both the Democratic and Republican nominations. This would seem to be a negation of what the party primary is intended to achieve: namely, to choose an official party nominee.

PURPOSE OF THE PRIMARY.

The direct primary was welcomed, a generation ago, as a device which would help raise the quality of elective officials. The old convention, it was said, allowed the political bosses to put forward candidates who would never have been selected by the rank and file of the voters on their own initiative. The way to remedy that situation, reformers urged, was to place directly in the hands of the people the nomination as well as the election of their

representatives. This would give a fair chance to men of ability and independence, whose appeal could rest on their own merits and not merely upon grounds of party regularity.

Under the convention plan, the voters of each party chose delegates to the convention, and these delegates nominated the candidates. Under the direct primary, the voters select the candidates themselves, without the intervention of delegates. Those who wish to be nominated for the legislature merely file petitions and their names are then placed on the primary ballot without further action on their part. As a rule, the various political parties hold their state primaries on the same day and use the same voting places. The primary is conducted like a regular election, but instead of electing, it merely nominates.

The new method of nomination has had a fair trial in state politics. It has now been used for over forty years. Has it proved superior to the convention as a means of securing capable legislators in the several states? On the whole, perhaps it has, although there is no certainty of it. At its best, the convention was capable of making good selections, and the direct primary has not often shown itself able to reach as high a standard. On the other hand, the convention at its worst could strike a level of trickery, incompetence, and corruption to which a primary rarely descends. In a word, the primary seems to afford protection against the worst fault of the convention, which was the frequent selection of incapable and corrupt candidates at the behest of a few political leaders. But it has not as yet demonstrated its own ability to secure outstanding results of a positive character. It has not rid the states of boss domination; on the other hand, it has increased the expense which every candidate must incur, and it gives a marked advantage to the self-advertiser, to the man whose name has been made well known to the voters, irrespective of his personal qualifications for the office which he seeks.

HAS IT JUSTIFIED ITSELF?

The worst shortcoming of the primary, however, may be found in the barrier which it interposes to responsible party leadership. The direct primary is the people's affair; the party leaders are supposed to let it alone. If they intervene openly, they are scolded as bosses and dictators. So they try to manipulate the primary from behind the scenes, and often they succeed in doing it. The voice of the direct primary is the voice of the people, but the hand is too often the hand of the politicians. Nominations in some of the states under the direct primary are not always determined by the people at the polls. They are fixed up at a stag party in some quiet hotel on a side street — just as they were in the old convention days.

ITS MOST SERIOUS DEFECT.

THEORY AND PRACTICE AT PRIMARY ELECTIONS.

The theory of the direct primary is that voters, of their own accord, will go to the polls and act wisely while the party leaders keep their hands off until after the nominations have been made. But the fact is that neither the voters nor the party leaders will do anything of the sort. Voters in large numbers do not go to the polls on their own initiative; they have to be stimulated by a publicity campaign. Moreover, they look to their party leaders and to their party newspapers for guidance in marking their ballots, because most voters are not personally informed about the merits of the various candidates at a primary election. Party leaders try to control the primary because they want to control the election. The direct primary puts them to extra trouble and makes them work under cover or spend more money; but it has not put them out of business. That is why the party leaders sometimes wonder why they ever feared the primary, while reformers ask themselves why they were led into the error of expecting so much in the way of a political miracle from it. If our experience in this field can teach us anything, it is the age-old lesson that a regeneration in American politics cannot be achieved by merely changing the contraptions through which the voters express their will.

WHAT IS THE ALTERNATIVE?

PRE-PRIMARY CONVENTIONS.

But if not the direct primary, what then? Shall we abolish it in state elections and return to the old convention system of nominating candidates? A few states have taken that step (notably New York), but it is by no means likely that their action will be generally followed by the others. It is more probable that the next move will be to try a combination of the two plans. This, indeed, is what a few states have already done. They have been experimenting with a scheme by which conventions are first called by each party to make the nominations for all state-wide offices. Then, if the members of the party are not satisfied, they may submit alternative nominations by circulating petitions and a primary is thereupon held to decide between the two. A few other states (Iowa and South Dakota, for example) have reversed the process. There the primaries are held first, but if no candidate receives more than 35 per cent of the party vote, the choice of a nominee is left to the party convention.

All this, it will be seen, adds more wheels to the electoral machine. The man who wants a state office must fight for it in the convention, then in the primary (if there is opposition), and finally at the state election. Or, he makes his first try in the primary and if his strength there is not sufficient, he carries his fight to the floor of the convention. Both the primary and the convention have their merits, and the problem is to devise some plan which will gain the advantages of both without the defects of either.

LOCAL AND AUXILIARY ORGANIZATION

THE LOCAL ORGANIZATIONS.

The activities of the state central committees and the state conventions are of a general nature. The committees plan and supervise, while the actual work of getting the voters registered, organizing them, rallying them to meetings, arousing their enthusiasm, and bringing them to the polls is done by the subordinate committees, which usually exist in each county, district, city, town, or township. When the party is thoroughly organized, this committee system extends to the wards of the cities, or even to the precincts within the wards. Members of the local committees are chosen in a variety of ways: by the voters at direct primaries, or by caucuses; sometimes they are virtually self-perpetuating. Even when chosen at primaries, they are likely to be self-perpetuating, because they are usually permitted to have the designation "incumbent" printed after their names on the primary ballot, and this gives them a marked advantage with the mass of the party voters who neither know nor care much about the personnel of the local committees. In any event, these local committees are always composed of active party workers. State conventions and committees may provide the platform and the funds; but the active work among the voters must be done by local organizations. Victory in a close campaign usually depends on their activities. The proof of good state leadership is to be found in the efficiency with which the organization functions in its lower ranges.

MINOR COMMITTEES.

It is difficult to generalize concerning the make up of local committees. The practice differs in rural and urban communities. A small town may have local party committees of only five or six members, while a large city is usually organized with ward and precinct committees, which include many hundreds in their membership. In these large centers, there is likewise a trusted party worker (commonly called the precinct committeeman or precinct captain) in immediate charge of the party's interests in every precinct. Much depends, moreover, on the local personalities. Hard workers get plenty to do and are correspondingly influential in the local organization, no matter what their official positions may be.

ANCILLARY PARTY ORGANIZATIONS, LEAGUES, AND CLUBS.

In addition to the local committees there are various special campaign organizations, particularly in the cities. These take the name of leagues or clubs, and their main purpose is political, although they may have some social activities as well, especially when an election campaign is approaching. Groups of voters belonging to a party organize themselves as the Women's Re-

publican Club, or the League of Young Democrats, or under some other such name. Then they rent a hall or vacant store as a headquarters, and make it their place of rendezvous. Volunteer workers at these headquarters do whatever work is assigned to them. Usually each club or league has some recognized leader as the moving spirit of the organization. Occasionally the club bears this leader's name. When a party is well organized, there will be at least one of these "clubs" in every small city and in every ward of a large city. The members are supposed to pay a small membership fee, but no one will ever be dropped for nonpayment of dues as long as he votes regularly and votes right.

There are good reasons for having these guerrilla bands outside the regular party organization. Not all the party workers can be given places on the local committees. The clubs or leagues afford opportunities for many others who are ready to help in an unofficial capacity. Moreover, these associations can do things which a regular party committee might hesitate to do. The activities and expenditures of the regular committees must be conducted strictly according to law, but the clubs are not so rigidly hampered in their operations. The party welcomes their help, but it can also disclaim responsibility when the need arises. Last, but by no means inconsequential, there is a very human consideration. Man is by nature a clubable fellow and likes to fraternize with others. Here is a way to gratify his desire for companionship and recreation. The ward club in the poorer districts of a large city provides a warm place where one can go on cold evenings, play a game of pool or poker, pick up a free cigar or two, and perhaps wheedle a nip from somebody's pocket flask. Not much of a club, some may say; but it is the only one that thousands of the city's wage earners ever get a chance to join. These men are bound by a common loyalty, a personal loyalty. They are inspired by the hope of a common victory.

REASONS FOR THEIR EXISTENCE, PRACTICAL AND PSYCHOLOGICAL.

MACHINES, BOSSES AND RINGS

In discussions of state or city politics, you will hear frequent references to "the machine." What is a political machine? It is something that cannot be explicitly defined, for it varies in structure from state to state, from city to city. In general, the active party workers, the leaders, and the higher committeemen, the county chairmen and the bosses, the heads of ward clubs, and the precinct workers — they are all cogs in the machine. There are big machines covering the whole state, and little machines that cover only a small town. There are personal machines which are virtually operated by a

THE MACHINE.

single leader or boss. They go into motion when he presses the button. There may be two or three of these personal machines within the same party, but all of them are in alliance when the final election comes. The outstanding characteristic of a political machine is the smoothness with which it functions. When a party organization, or some portion of it, becomes so thoroughly disciplined that it works with machine-like precision, we call it a machine.

A PURELY AMERICAN INSTITUTION.

Political machines exist in America only. There are party "organizations" in other countries, but they are not called machines and do not deserve the name. They are loosely constructed and, hence, do not always respond when they are needed. Often they go to pieces when the campaign is over. In England the politicians have tried to build up machines, but without a great deal of success, although they have made some headway in recent years. America remains the classic land of machine politics. Yet the development of the machine in America is not an accident. Various conditions and circumstances have contributed to its upbuilding.

WHY IT HAS EVOLVED IN THE UNITED STATES: 1. FREQUENCY OF ELECTIONS.

Among these causes the most important is the frequency of elections, due to the fact that so many officials of state government are elective and hold their posts for short terms. In no other country do elections occur so often. In America the echoes of one campaign have hardly died away before the preliminaries begin to be arranged for the next. The result is that those who look after the party's interests have time for little else. It is a continuous performance, and those who take part in it enter a profession. A fraternity of professional politicians is the outcome. The professional politician is more in evidence among Americans than among Europeans, for the simple reason that we provide more for him to do. If political campaigns came only once in four or five years, it would be difficult to keep party organizations in working trim from election to election. But when voters are called to the polls at least every year, and sometimes two or three times a year, the political leaders are never accorded a long vacation. The American political machine would rust in other countries.

2. THE NOURISHMENT OF PATRONAGE. ITS TWO FORMS:

The system of political patronage has also had its part in creating the machine. Patronage is of two sorts, offices and favors. The distribution of offices under the spoils system, by which party workers are rewarded with lucrative appointments, has been a natural incentive to political diligence. State and local committeemen, organizers of clubs and leagues, ward leaders, bosses, henchmen, heelers, and all the other votaries of the machine,

do not give days and weeks to their work from motives of pure patriotism. They are inspired by a lively sense of favors to come — favors for themselves or their friends. The man who serves the machine without any hope of reward is a rarity — so rare a creature that he ought to be protected by the game laws. The machine owes its sustenance to patronage, much of which comes in the form of appointments, promotions, jobs, anything that will effect a short circuit between the party worker's pocketbook and the public treasury.

OFFICIAL PATRONAGE.

But there is another form of patronage, and although it has had less prominence in public discussion, it is very influential in its contribution to the vitality of the machine. This form of patronage includes the controlling of legislation for the benefit of railroads, street railways, gas, electric, water, telegraph, and telephone companies, labor organizations, the farmers as a class, banks, newspapers, and industrial concerns — not to speak of liquor dealers, race tracks, motion-picture houses, broadcasting stations, gasoline filling stations — the great array of "interests" which stand to profit from laws of one sort and to lose from laws of another. The machine will serve or oppose any or all of them as political strategy dictates. In either case it exacts its price. Political patronage includes also the awarding of contracts for public works and the bestowal of favors in a multitude of other ways. In the old days, the man who sought or distributed patronage wore a checked vest, sported diamond shirt studs, and pocketed his rake-off in a wad of soiled currency. Today, he rides in a limousine, carries a brief case under his arm, and sometimes calls himself a public relations man. "Everybody is talkin' these days about men growin' rich on graft," said Plunkitt of Tammany Hall, "but nobody thinks of drawin' the distinction between honest graft and dishonest graft. There's all the difference in the world between the two." [1]

UNOFFICIAL PATRONAGE.

The machine subsists, for the most part, on "honest graft." It dispenses political favors, protection, friendliness. Its revenue comes from public service corporations, or if corporations are prohibited by law from contributing to party funds, it is supplied by individuals who are known to be in touch with them. It comes from contractors who want big jobs, or from those who have supplies which they desire to sell to the state or the city. It comes, to some extent, from legitimate business which, in an era of constant governmental interference, desires to have friends at the state capitol or the city hall. But it comes also from tax dodgers, narcotic

CONTRIBUTORS TO THE PARTY WAR CHEST.

[1] W. L. Riordon, *Plunkitt of Tammany Hall* (New York, 1905).

pedlars, gamblers, racketeers, and the underworld in general, and from that great variety of other sources where the urge to "keep things fixed" is the mainspring of reluctant generosity. The machine, in a word, flourishes because the system of practical politics, which exists in most of the states, provides the sinews of war in the form of patronage and help. Civil service reform has done something to minimize this evil, and strict laws relating to the competitive awarding of contracts have also helped in some measure. Yet party service and free-handed contributions to the party chest continue to be recognized as the surest passports to official favor.

3. OTHER FACTORS WHICH HAVE HELPED THE GROWTH OF POLITICAL MACHINES.

Other factors have also, no doubt, contributed to the evolution of political machines in America. The presence of newly naturalized citizens in large numbers, particularly in some of the eastern states, has been an incentive to thorough organization. Assiduous party propaganda counts for much with these voters who have not, like the native-born, inherited a definite leaning towards either one of the regular parties. The long ballot with its party columns and its consequent premium on voting a straight ticket has also played into the hands of the machine. The material prosperity of the United States has been a contributing factor as well. Prosperity, while it lasts, is a silencer of criticism, a deterrent to reform. When people are absorbed in the business of accumulating wealth, they do not begrudge the politician his share so long as he lets them alone.

THE BOSS.

BOSSES AND LEADERS DISTINGUISHED: 1. IN RESPONSIBILITY.

The head of the machine is usually known as the boss. He is the man who gives the orders. The boss in politics is just like any other kind of boss. Bossism, of course, is neither a modern nor an American product — there have been bosses since the days of Pericles. It is the excellence of his work, not the nature of his position, that has brought the American boss into world-wide prominence.[1] Leader and boss are often used as interchangeable words in the vernacular of practical politics, but it is not accurate to employ them in that way. A leader has a position which is clearly defined by law or by the rules of the organization. He has definite duties and a direct responsibility which he cannot conceal. His acts are performed in the open. A boss, on the other hand, while he may be a party official, does not derive his power from that fact. His authority comes through informal and undefined

[1] See the chapter on "The Boss in Politics," in the author's *Personality in Politics* (new edition, New York, 1934) also J. T. Salter, *Boss Rule* (New York, 1935), and Harold Zink, *City Bosses in the United States* (Durham, N. C., 1930).

channels; he uses his machine for personal as well as party ends; and he does not owe any real responsibility to the rank and file of the voters.

In methods also, as well as in responsibility, leadership and bossism are different. The leader leads, and the boss drives. The leader appeals to the sense of loyalty of his followers; he tries to inspire and persuade. The boss does not argue, for he is a boss by divine right. Yet bosses are not all alike in their political methods. They differ as widely as men in any other profession. There are easy bosses and bosses who use the mailed fist. The newspaper cartoons usually portray the boss as a heavy-set, beetle-browed fellow, who wears loud clothes and chews the end of a black cigar. But the boss does not look, or dress, or act, like that in real life. Not infrequently he is a man of education with close friends among the captains of industry. A generation ago there were bosses like "Bathhouse John" Coughlin of Chicago whose eccentricities of attire and action kept him on the front pages of the newspapers, but nowadays the successful boss keeps himself in the background.

2. IN METHODS.

The boss holds his place by giving service. People who have business with their government like to do it with somebody who has authority. Under the American scheme of state government, the power is divided among a great many officials; so the boss regathers it into his own hands where it can be utilized. He is the broker who gets you what you want when you are ready and able to meet his terms for it. In the crowded wards of the great cities, moreover, the boss is the mediator between the higher-ups and the lower-downs. He is the protector of the common man against his troubles of every sort. Likewise, it is the boss who gets special favors for the well to do — for example, an abatement of taxes or a lowered assessment on some piece of property. All day and every day he is doing favors, big and little.[1] From those who can afford it, he expects, in return, a contribution to his campaign funds; from the rest, he looks for votes on election day and he usually gets them. By doing favors he obtains control of political power, and by means of this political power, he is able to do more favors. It is a circle hard to break.

WHY THE BOSS SUCCEEDS.

Groups of bosses are known as "rings." A boss prefers the monarchical form of government, with himself on the throne, but this type of rule is not always practicable. So he sometimes finds it necessary to share his throne with others. Rings are powerful as long

RINGS.

[1] For a good account of the way in which he does it, see Alfred E. Smith, *The Citizen and His Government* (New York, 1935), pp. 8–19.

as the members work together; but eventually they disagree, and then the ring goes to pieces. The two most famous rings in American political history were the Tweed Ring, which dominated New York sixty years ago, and the Gas Ring, which held Philadelphia in its clutches a little earlier. But there are little rings all over the country — county rings, courthouse rings, rings of road contractors, rings made up of politicians and racketeers in alliance, rings of every sort. They are forming and dissolving all the time.

THE POLITICAL CIRCUMSTANCES WHICH HAVE ENCOURAGED BOSSISM IN AMERICA.

Many denunciations have been showered upon bosses and rings; but both are logical products of political conditions which have existed in most American states until recent years, and which still continue in some of them. Discipline helps to win elections as well as battles, and good discipline cannot be maintained except by lodging vast final powers in the hands of a shrewd, active, and experienced commander in chief. There will be bosses in American politics so long as government by patronage, the spoils system, the multiplicity of elective offices, the long ballot, the frequency of polling, the lobby, the policy of legislation by trade and bargaining, the gerrymander, the pork barrel, and a dozen other iniquities combine to place at a disadvantage the leader who insists upon fair and open methods of electoral combat. "Blessed are they who live up to the law for they shall be licked when the votes are counted." That beatitude of practical politics is unhappily too often true.

THE REMEDIES FOR BOSS RULE.

The cure for bossism is in the eradication of the things which have brought it into being. The reduction in the number of elective offices, the use of the short ballot, the extension of the merit system to all subordinate appointments and to all promotions, the simplification of nominating and election machinery, the practice of requiring all campaign contributions and expenditures to be made public, the placing of public contracts on an open-competition basis, the purchase of supplies by public tender, the rigid control of lobbying in legislatures, the extension of social service facilities in the crowded sections of large cities, and the encouragement of civic education — these reforms have helped and are helping to rid the states of boss politics. Such riddance, moreover, is in the highest degree desirable, for no political system can be really democratic so long as it suffers any man to exercise large political powers without formal authority or responsibility.

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See also the references at the close of Chapters VIII and IX.

CHAPTER XXXIX

THE STATE LEGISLATURE

I am not a politician and my other habits are good. — *Artemus Ward.*

The legislature is the paramount branch of American state government. It makes the state laws, controls the expenditures, and determines the duties which the administrative authorities perform. It can investigate any branch of state administration at any time. It is true that limitations in the state constitution have everywhere circumscribed the jurisdiction of the legislature, and that in many states the use of the initiative and referendum has further impaired its supremacy. It is also true that the development of independent administrative officials and boards has taken from it many of its regulatory functions. Yet the legislature maintains its position as the dominating branch of state government.

IMPORTANT ROLE OF STATE LEGISLATURES IN AMERICAN GOVERNMENT.

Many Americans have a wrong conception of what their state legislature is supposed to be. They look upon it as a sort of secondary law-making body which concerns itself mainly with minor questions that are not of sufficient importance to engage the attention of Congress. It rarely occurs to the average citizen that these state legislatures supply the motive power for the entire mechanism of American government in nation, state, county, and city. Without action by the state legislatures (in prescribing the qualifications for voting, arranging the machinery of elections, and certifying the results), there would be neither President nor Congress — at any rate, neither could be chosen under the existing Constitution of the United States. Without action by the state legislature, there would be no elections, no voters' lists, no public schools, and no municipalities. In this sense, the state legislature is the pivot of our entire governmental system.

A WRONG CONCEPTION OF IT.

The citizen should take more interest in his state legislature. He should be more concerned about its personnel and powers. For this body, to a greater extent than Congress, determines his political privileges and his immediate social relationships. It regulates his civil rights and duties,

secures him in the tenure of his property, and makes most of the rules that govern his daily movements. To do these things efficiently, it is essential that the state legislature be properly organized, truly representative, unhampered by needless constitutional restrictions, and endowed with adequate authority.

ORGANIZATION OF STATE LEGISLATURES

GENERAL STRUCTURE OF THE LEGISLATURE.

The organization of the legislature differs from state to state, but in essentials it is the same throughout the country.[1] In every state, except Nebraska, it is made up of two elective chambers with substantially concurrent lawmaking powers. The upper chamber, called the senate, is the smaller of the two. Its members are elected from senatorial districts and their term of office is either two or four years, except in New Jersey where it is three years. The lower chamber, which is variously known as the house of representatives, or assembly, or house of delegates, is a larger body; its members are chosen from smaller districts and the term of office is sometimes shorter, being in most states only two years.[2] These districts are rearranged from time to time, usually after each decennial census, to make them approximately equal in population. This redistricting provides an opportunity for gerrymandering, which the majority party in the legislature almost invariably seizes to its own advantage.[3]

WHY THE BICAMERAL SYSTEM HAS BEEN ADOPTED.

Why have all the states been using this double-chamber or bicameral system? To some extent the reason may be found in certain reputed merits of the plan, but the influence of the national example has also been important. When a two-house Congress was provided in the frame of national government, this set a model for all other American legislatures. Accordingly, those states which began with one chamber replaced it in due course with two.[4] Then the new states, as they were formed, established bicameral legislatures one after another. In some cases they were also influenced by the fact that the double-chamber plan permitted

[1] The nomenclature varies throughout the country. "Legislature" is the most common term, but nineteen states use the term "general assembly." Massachusetts and New Hampshire officially employ the quaint term "great and general court," but in popular usage the term "legislature" is much more common in these two states.

[2] New Jersey's term is one year and the term in Louisiana, Alabama and Maryland is four years.

[3] The smallest state senate is that of Delaware, with 17 members; the largest is that of Minnesota, with 67. The smallest lower chamber is that of Delaware, with 35 members; the largest is that of New Hampshire, with 443.

[4] J. B. Kingsbury, *Unicameral Legislatures in Early American States* (St. Louis, 1925).

a dual suffrage, with a high property qualification for the state senate and a lower one for the assembly. But gradually the distinction in suffrage was abolished while the two chambers remained.

VALUE OF DUAL REPRESENTATION.

Then arose the idea that even if the two chambers were elected by the same voters, they could nevertheless be made to represent different interests — the senate, for example, representing geographical areas, such as counties, while the assembly represented quotas of population. With the growth of cities, and the massing of people in them, more emphasis came to be laid upon the idea of having the upper chamber represent counties equally, without regard to differences in population. There also developed in the public mind a belief in the usefulness of a divided legislature as a safeguard against hasty lawmaking and as a part of the system of checks and balances.

RURAL PREDOMINANCE.

The practice of discriminating against the urban centers in favor of the rural districts is still common.[1] In a few states there is a constitutional provision that each county, irrespective of its size, shall have the same number of senators; in others that each county shall have a certain minimum and that no county shall have more than a prescribed maximum of representation. Still others gain advantage for the rural districts by delaying a reapportionment, when they find the cities growing more rapidly than the rest of the state. As a result of this, the rural districts usually control the upper chamber. Baltimore has half the population of Maryland, but elects only one fifth of the senators of that state. Rhode Island allows Providence only one senator, although the city's population would entitle it to sixteen. Cook County has more than half the population of Illinois, but elects only about a third of the members in both chambers of the state legislature. This jug-handled arrangement is defended on the ground that it would be unwise to hand over full control of both chambers to a few large industrial communities. And as a practical matter, it is perpetuated, in many cases, by an alliance between the rural voters on the one hand and the vested interests of the urban communities on the other. The latter believe that a legislative chamber can more easily be kept friendly to property rights when it is controlled by up-country members.

The grounds upon which the bicameral system is defended today are not so convincing as they were a century ago.[2] The danger of hasty or secret action, under modern rules of legislative procedure, with the print-

[1] For a full discussion see J. G. Thompson, *Urbanization* (New York, 1927), Chaps. i–ii; A. Z. Reed, *The Territorial Basis of State Government* (New York, 1911), Chaps. vii–viii; and C. M. Kneier, *City Government in the United States* (New York, 1934), Chap. viii.

[2] Dorothy Schaffter, *The Bicameral System in Practice* (Iowa City, 1929).

ing of proposed measures and committee hearings open to all, likewise with three readings of every measure in the legislature and with ample opportunity for consideration, not to speak of a governor's veto power in the background and sometimes a popular referendum as a last resort — with all these safeguards, the opportunities for slipping injudicious or unpopular measures upon the statute book are very few. There is more danger nowadays that a meritorious bill will perish on the long and tortuous road to enactment than that an unworthy measure will get through without proper scrutiny.

IS THE BICAMERAL SYSTEM ADVISABLE TODAY?

Nor does the idea that one chamber will exercise a helpful check upon the other prove to be a sound one when put to the test of actual practice. Both chambers are composed of party men. If the same political party controls a majority in both, the check imposed by one house upon the other is rarely of much value; whereas if different political parties control the two chambers, the checking often becomes so persistent that deadlocks ensue and progress is blocked. It has been found that, under normal conditions, most of the measures which pass one chamber are accepted by the other. Rarely, under such circumstances, does one chamber reject as many as 10 per cent of the bills passed by the other. This is not surprising, for the same political leaders usually control both chambers, or if there are different leaders, they work together. Complaint is made in some states, however, that the upper chamber is more conservative than the lower and sometimes rejects important measures of a liberal character which have been passed by the latter.

HOW IT FUNCTIONS IN PRACTICE.

The bicameral system in the state legislature is retained, for the most part, out of respect for tradition. The notion that cities and rural districts have different interests in state legislation, and that this divergence requires dual representation, is not supported by the records of votes taken in American legislative bodies. A study of the facts does not show that the bicameral system possesses, in any large measure, the merits which are commonly attributed to it. On the other hand, the division of legislative authority has some serious defects. It increases the cost and complexity of the lawmaking machinery; it facilitates and even actively encourages the making of laws by a process of compromise, bargaining, and log rolling; it compels all legislative proposals to follow a circuitous route on their way to final enactment; it provides countless opportunities for obstruction and delay; and it facilitates the shifting of responsibility for unpopular legislation. Bills are often passed by one chamber with the intent that they will be "given the

DEFECTS OF THE TWO-CHAMBER SYSTEM.

axe" in the other, in accordance with an understanding reached beforehand. Finally, the double-chamber system has proved a barrier to the planning of the laws. The coordination of leadership and planning is difficult unless some dominating governor is able to provide it, or some political boss steps in and arrogates it to himself. "Inasmuch as it is next to impossible to determine who is running the legislature from the inside," said Woodrow Wilson when he was governor of New Jersey, "there is an instinctive desire to have some force directing and leading it from the outside."

ITS ABOLITION IN THE CITIES.

In the large cities of the United States, the bicameral system was widely used a generation ago; today it has been abandoned almost everywhere. Among the twelve largest American cities not one now maintains a double-chambered council, unless we call the board of estimate an upper chamber in New York City. Some of our cities with single-chamber councils of nine, or fifteen, or twenty-one members, are more populous than various states with double-chamber legislatures; and their problems are surely just as complicated. It seems curious that Nevada, Delaware, Wyoming, and Rhode Island should require two chambers, while Chicago, Philadelphia, Detroit, and Cleveland can get along with one.

NEBRASKA'S EXPERIMENT WITH A SINGLE CHAMBER.

In view of the criticisms which have been directed against the bicameral system, the experiment with a single chamber in Nebraska commands more than passing attention. The change to a single chamber was approved in that state at a constitutional referendum in 1934, and the new arrangement went into effect three years later. The Nebraska legislature now consists of 43 members elected on a nonpartisan ballot for a term of two years. Experience thus far indicates that some advantages have been gained by the reduction from two chambers to one. The number of bills introduced has been cut down, procedure has been simplified, and the time consumed in legislative deliberation has been shortened. The quality of the legislative output, in the opinion of those qualified to speak, has been improved. But it is not certain that all this can be attributed to the streamlined legislative machinery. Some of it undoubtedly results from Nebraska's action in setting up a special body known as the legislative council, the organization and purposes of which are discussed towards the close of this chapter.[1] At this point, however, it should be explained that the legislative council is an appointive body which prepares the legislative program in advance of the session, serves as a bill-drafting agency, and assumes some responsibility for legislative

[1] See p. 659.

leadership. It is not unlikely that Nebraska's experience will inspire movements for similar changes in other states.[1]

COMPOSITION OF THE LEGISLATURE

Candidates for the legislature are nowadays usually nominated by means of the direct primary, although a few states still use the old convention system, or in some cases the party caucus. The polling in many, but not in all, of the states is held upon the same date as the national elections. Each state, under the constitutional rules already set forth as to race and sex discriminations, has the right to determine who may vote for members of its own legislature, but universal suffrage is now the rule. All the states have a minimum residence requirement and some of them have poll-tax requirements and/or a literacy test for voting.

THE ELECTION OF STATE LEGISLATORS.

A plurality of votes is normally sufficient to elect. This practice is often criticized because it can, and frequently does, lead to the election of a representative from a district by a minority of the total vote cast, and technically leaves the combined opposition, which together may total a majority, without representation. Nevertheless, the states have shown no favor for cumulative or preferential voting systems designed to insure a majority choice. Nor has any state seriously considered adopting a system of proportional representation, designed to give all sizable minorities, as well as the majority, a chance to elect representatives. Proportional representation, however, is being used in several large American cities with results which are still the subject of much controversy.[2] Only in Illinois has there been a departure from the simple plan of plurality choice. There, since 1870, any voter may cast one vote for each of three candidates for the lower house of the legislature or he may "plump" all three votes for a single candidate. This system, known as cumulative voting, is designed to give the minority faction a chance to elect at least one of the three representatives who are chosen from each assembly district. The system of cumulative voting in Illinois has never been wholly popular, and one of the provisions in the proposed new constitution of 1920 suggested its abolition. But this proposed constitution was rejected in toto by the voters and the cumulative system remains in force.

PLURALITY CHOICE SUFFICIENT.

PROPORTIONAL REPRESENTATION AND CUMULATIVE VOTING.

[1] On Nebraska's experiment see John P. Senning, "Nebraska's First Unicameral Legislative Session," *Annals of the Academy of Political and Social Science* (Jan. 1938), pp. 159–167.

[2] For a favorable view of proportional representation see C. G. Hoag and G. H. Hallett, *Proportional Representation* (New York, 1940); for an effective criticism of the system, F. A. Hermens, *Democracy or Anarchy?* (Notre Dame, Ind., 1941).

The quality of state legislators is considerably higher in some parts of the country than in others. It varies, indeed, in different parts of the same state. On the whole, however, it is fairly representative of the whole electorate. This is not the opinion generally held by political reformers, but any careful study of the matter will show it to be the case. Almost every profession and business vocation, almost every degree of intelligence and the lack of it, almost every gradation of public spirit and self-interest, will be found represented. Lawyers form the largest single element in American state legislatures, except in the strongly agricultural states, and even there they manage to figure considerably.

QUALITY OF THE MEN CHOSEN.

Most state legislators are relatively young men, thirty to forty-five years of age. Women have been making their way into the legislative chambers during recent years, but their number is still rather small. Experience is of great advantage to a state legislator, but most of the members do not stay long enough in either chamber to acquire much of it. The turnover is fairly rapid, although there are exceptions and one can occasionally find men who have served in state legislatures for ten or even twenty years. It is a frequent assertion that the standards of competence in the state legislatures are disappointingly low as far as a knowledge of business problems is concerned, but they are probably above the average of the populations which do the voting.

Only four states, New York, New Jersey, Rhode Island, and South Carolina, hold regular sessions of the legislature every year. All the other states content themselves with a session every two years. And whether annual or biennial, they are often limited by the state constitution to a session of not more than two months. Two states, Oregon and Wyoming, require that the legislature shall finish its work within the space of 50 and 40 days respectively. Where no time limit is prescribed, the same end is sometimes accomplished by a constitutional provision that legislators shall be paid so much per diem for so many days and nothing thereafter. One of the results of the relative infrequency of regular sessions and the arbitrary time limitations imposed upon them is an increase in the number of special sessions. Normally, these are called by the governor; and in a majority of the states, he is permitted to determine what matters may be considered at a special session.

FREQUENCY AND LENGTH OF SESSIONS.

A novelty in legislative procedure, introduced by California in 1911, is the bifurcated or split legislative session. Under this plan the legislature holds a preliminary thirty-day session during which bills and resolutions are introduced. Then comes a recess of equal length which is

designed to give the legislators an opportunity to discuss these measures with the voters of their respective districts. Following the recess, the legislature resumes its work, with no limit upon the duration of its session, except that the legislators get no pay after one hundred days. New bills cannot be introduced during the second portion of the legislative session except under certain procedural restrictions, which are intended to discourage belated proposals. It was hoped that this arrangement would enable the legislature to utilize its time more efficiently and prevent the piling up of measures during the last few days of legislative sessions, but these expectations have not been altogether fulfilled. Although several other states have experimented with the split session, New Mexico (1940) being the latest to provide for it, there is not much likelihood that it will become a regular feature of American legislative practice. The arrangement has some advantages, but it has by no means relieved the congestion of business in the closing days of the session.

THE SPLIT LEGISLATIVE SESSION.

The powers of the state legislature, as has been said, are broader and more important than the casual student of American government realizes. They comprise every field of governmental activity not restricted by the federal Constitution or by the constitution of the state itself. Those limitations upon the states which are provided by the federal Constitution have already been mentioned.[1] Those which the state constitutions impose relate not only to the rights of the citizens, but to many other matters on which the limitations differ from state to state. A few examples will illustrate the general character of these prohibitions.

POWERS OF STATE LEGISLATURES.

LIMITATIONS THEREUPON: 1. IN THE FEDERAL CONSTITUTION.

Legislatures are sometimes forbidden by the terms of their own state constitutions to grant special charters to municipalities or private corporations, to authorize public borrowing beyond a fixed point, to impose property qualifications for voting, to grant public money to sectarian institutions, to give perpetual franchises to public service corporations, to lend the state's credit to private enterprises, to change county seats without the consent of the voters concerned, to reduce the salaries of judges, to make discriminations in the tax laws, etc. In addition to these actual prohibitions, the state constitutions often prescribe in detail the way in which many things shall be done; even the methods of procedure in the legislature are sometimes set forth in detail. For example, it is often stipulated that all bills shall be printed before being acted upon, that no bill shall deal with

2. IN THE STATE CONSTITUTION.

[1] See pp. 595–600.

more than a single subject, and that there shall be a roll call on certain measures. The tendency has been to increase the number and extent of these restrictive provisions, so that the legislature now faces at almost every turn the danger of having its laws declared unconstitutional.

THE BROAD FIELD WHICH REMAINS WITHIN THESE LIMITS.

Yet the legislature has a great many laws to make, for it is vested with the duty of looking after a widely diversified list of matters. Either directly or through the agency of subordinate municipal authorities, the state legislature provides the citizen with police protection, with redress for wrongs done to him, with highways and sanitation, with libraries and recreation facilities. The state laws determine most of the taxes which he pays, and most of the civic duties which he must perform — such as serving on a jury. The state laws reach out into the shops and factories, regulating the hours and conditions of labor. They provide for the care of the poor, the insane, and the delinquents of all ages. State laws are much more numerous than federal statutes; it has been estimated that it takes about one hundred and fifty volumes to hold the biennial output of state laws, not to speak of ordinances by the tens of thousands which are annually adopted by county supervisors and city councils under authority granted to them by the state legislatures.

LEGISLATIVE PROCEDURE. MODELED ON THAT OF CONGRESS.

In the exercise of this extensive lawmaking function, each state legislature determines its own rules of procedure, subject, however, to any provisions that happen to be laid down in the state constitution. But practically all of the state legislatures follow rules which are in general similar to those of Congress, so that the procedure used in legislative chambers throughout the United States is much the same. This applies to the introduction of bills, the three readings, the powers of the presiding officer in each house, the system of committees, the rules of debate, the methods by which the two chambers take action upon pending measures, and the rules of order. There are innumerable differences in the detailed rules, but relatively few in the general process of lawmaking.[1]

THE PRESIDING OFFICERS OF STATE LEGISLATURES.

As for the presiding officers in state legislatures, the influence of the federal analogy is everywhere apparent. When a state has a lieutenant governor, he usually (but not always) presides over the state senate, just as the Vice-President of the United States occupies the chair in the upper House of Congress. But the lower chamber of the state legislature in all parts of the country elects its own speaker. In practice, the choice is

[1] The situation is fully discussed in Harvey Walker, *Lawmaking in the United States* (New York, 1934), Chaps. ix–xiv.

first determined by a caucus of members belonging to the political party which controls a majority in the assembly and is then formally ratified by the chamber as a whole. This speaker has the usual functions of a presiding officer, including, in about two thirds of the legislatures, the duty of appointing all members of committees from his own chamber. In the remainder, committee assignments are arranged, as in the national House of Representatives, by a committee on committees. In the upper house, or state senate, committees are variously appointed by the presiding officer, by a committee on rules, a committee on committees, or by a special committee; and in at least two states, they are elected by the senators directly. Each house of a state legislature also chooses its other officers and employees, including chaplain, clerk, sergeant-at-arms, and messengers.

LEGISLATIVE COMMITTEES.

Much of the preliminary work of state legislation is performed by committees, and every legislature maintains a considerable number of these subordinate bodies.[1] In most of them there are separate committees for each chamber, but in a few (notably in Massachusetts) nearly all committees are joint committees composed of members from both chambers. This system of joint committees avoids much duplication of work. In size the committees vary, running from as few as five to as many as forty-five members or more. The committees are also of varying importance. Some of them, such as the committees on finance, on ways and means, on rules, on the judiciary, on labor, on industrial affairs, on cities, on education, on public institutions, and on public utilities, may have a great deal to do. Others, such as those on printing, on fisheries and game, on pensions, and on federal relations, may have very little. In addition to these regular or standing committees, there are special committees which are appointed whenever the occasion arises. Special commissions, including persons who do not belong to the legislature, are also authorized to study important matters and to make recommendations. This arrangement enables a legislature to make use of expert assistance outside the ranks of its own membership.

THEIR FUNCTIONS.

Every measure introduced into either house of the legislature is forthwith referred to the appropriate committee. There, in regular order, hearings are held at which both the supporters and opponents of the measure are entitled to appear. The members of the committee sit patiently and listen — some of them do. Unfortunately, a legislator may be a member of more than one committee and he cannot attend two hearings at the same time. So the hearings are always held by committees with some members absent. In

[1] For a full discussion see C. I. Winslow, *State Legislative Committees* (Baltimore, 1931).

some states, the rules require that a hearing shall be advertised upon every measure, and that before a certain date every matter referred to a committee shall be reported back, favorably or otherwise, to the legislature. In other states, such hearings are not held except upon important matters, or when asked for; and committees are not under any obligation to report upon every proposal that is turned over to them. In these legislatures, as in Congress, matters may die in committee, that is, may be left in the committee's files without any action until the legislative session ends.

MERITS AND FAULTS OF THE COMMITTEE SYSTEM IN THE STATE LEGISLATURES.

The committee system in its actual operation among the several states has displayed great merits and equally grave defects. Legislation without the aid of committees is practically impossible so long as legislatures retain their present size, for only by some such division of labor can the huge grist of bills receive any consideration at all. Where the committees are intelligently constituted, the committee system means that all measures are entrusted for preliminary consideration to those legislators who know most about them. Legislators who sit on the municipal affairs committee of a state legislature, for example, inevitably learn a good deal about city problems and may become, after a while, quite proficient in that field. In principle, therefore, the committee system is sound.

But the trouble is that too often the committees are not properly constituted. They are frequently made up by a process of political manipulation. In other words, the members are not assigned according to their personal aptitudes but on a basis of seniority and political influence. A new member is automatically assigned to one or two minor committees where he finds no inducement to become familiar with his work, for he hopes and expects to get himself assigned to different and better committees at the next session. Then, when he obtains this promotion, he acquires the ambition to go still higher in the committee scale, until finally he reaches the committee on rules or the committee on appropriations, which are usually the most sought after. A good many legislators think more about what they are going to do on next year's committees than about what they should be doing on this year's.

TOO MANY COMMITTEES.

Most state legislatures have too many committees. And in many of them the committees are too large. Good work cannot be done by a committee of thirty members, half of whom are absent from each hearing. Moreover, the distribution of bills among the committees is very uneven; some are swamped with measures, while others have little or nothing to do. One committee may have a hundred bills referred to it, while another gets only two or three bills

during the entire session. It all depends on whether the committee is one that has to deal with an important and timely field — such as agriculture, or public utilities, or education. A legislative committee on fish and game, or on sanitation, or on state monuments, may have only a half-dozen bills per year. Finally, there is no coordination of committee work. Each committee usually works by itself, even when matters closely akin to the activities of some other committee are being studied.

FREQUENT DISREGARD OF COMMITTEE RECOMMENDATIONS.

Another feature which is destructive of efficient committee work is the tendency of the legislature to disregard the reports of its committees and by its own votes to reject, without adequate reason, the recommendations which committees have arrived at after prolonged discussion. It is true that in most legislatures the report of a committee, particularly if it is made unanimously, carries great weight; but nowhere is there any certainty that its recommendations will be accepted. A powerful lobby may influence enough senators or assemblymen to reject it. Traditions and practice in this matter differ greatly among the states; but, in general, it can be said that the unconcern with which legislatures often set aside the recommendations of their own committees is a serious weakness in the American system of lawmaking.

IMPORTANCE OF LEGISLATIVE PROCEDURE.

The details of legislative procedure are too complicated to be set forth in brief form without the risk of serious inaccuracy. Yet this is a branch of the subject which cannot be entirely omitted from any discussion of American government, for the spirit and form of the laws are determined in some measure by the system of legislative procedure. The quality of the statute book depends on it — at least to some extent. Simplicity of procedure is essential to the orderly making of laws. On the other hand, a certain amount of formality is necessary to ensure that laws shall not be made or unmade hastily, or in obedience to the dictates of prejudice and excitement. American legislative procedure has been severely criticized because of its complexity, and to the layman it does seem needlessly complicated; but lawmaking is a serious business and must be carried on under adequate safeguards. Legislative bodies, moreover, are slaves to tradition. Once a rule is adopted, it becomes almost impossible to change, no matter how useless or even detrimental it may have become. It may be frequently suspended, but it stays on the books. Thus, the rules pile up until the task of learning them takes most of a new member's time during his first session. And when he has mastered them, he usually opposes any changes in these rules simply to avoid learning them all over again.

The prime purpose of legislative rules is to expedite business and pre-

vent congestion. But they have not usually been successful in achieving this end. The congestion of business in many of the state legislatures, towards the end of the session, is notorious. It is not uncommon to find hundreds of bills halfway through the legislature when it enters upon the last week of its session. Even at this stage of the deliberations, moreover, new bills may be introduced to complicate matters further. This often results in a series of frantic all-night sessions at which the legislators try to hurry bills through under suspension of the rules. The eleventh-hour congestion is partly due to the dilatory action of committees in reporting bills, but it also arises from the nonchalance with which the legislature fritters away its time during the early weeks of the session. Legislatures could avoid most of the trouble by placing strict limitations upon the introduction of new bills after a certain deadline and by adopting a rule that committees must report all bills before a prescribed date, this date being set well in advance of the close of the session.

THE CONGESTION OF BUSINESS.

Let us take a look at the process of lawmaking in a state legislature. The outline here given will not hold accurate in any one state, for there are many differences in the detailed rules. Moreover, the rules are not themselves to be depended on, for in some legislatures they are suspended at frequent intervals or even ignored by unanimous consent. The rules, for example, may require that a designated number of members shall be necessary for a quorum, but unless someone rises in his place and complains that a quorum is not present, the rule is generally ignored. And if a count shows less than the required number to be in the chamber, when this point of order is raised, the sergeant-at-arms or other attendant scurries out into the lobbies and rounds up enough absentees to meet the requirement. Thus, when the count is finished, they drift out again and the business goes right on as before. So, not only do the rules of legislative procedure differ from state to state, but there is considerable variation in the strictness with which the printed rules are followed. Nevertheless, the general procedure in the enactment of a law is about as follows:

THE PROCESS OF LAWMAKING.

First comes the drafting of the proposed bill. Every law has its embryo in a bill, and every bill originates with an idea in somebody's head. Usually it is somebody outside the legislature, for rarely do legislators originate new ideas. Nor, for that matter, do they always understand old ones. Anyhow, the idea must be elaborated into a bill before it can be introduced; and getting the bill properly drafted is not an altogether simple job, although there are plenty of amateur lawmakers who think that it is and do not disdain to

1. THE DRAFTING OF A BILL.

try their hands at it. Hence many bills are presented to state legislatures in ungainly form, with provisions crudely expressed, ambiguous in wording, and otherwise defective. The trouble is that, in America, we assume the competence of any citizen to frame a law, an assumption which may have been a workable one in early days when conditions of life were simple, but which, in its application to the intricate mechanism of modern society, is as absurd as it would be to assume that any citizen is competent to command a battleship because he is able to paddle a canoe.

BILL DRAFTING BY EXPERTS.

The proper drafting of a law requires skill and experience. Not only must the purpose of the proposed measure be clearly expressed, but care must be taken, or at least should be taken, to see that its provisions are consistent with earlier legislation on the same or a related subject and that they do not unintentionally repeal or reenact the provisions of earlier statutes. For this reason, many of the bills now presented to the legislature are framed by lawyers who have been employed for the purpose by civic organizations, private corporations, or individuals. Those relating to counties, municipalities, and other political subdivisions are usually prepared for them by their own legal advisers.

LEGISLATIVE REFERENCE AND BILL-DRAFTING SERVICES.

But many bills are still drafted by the members of the legislature themselves, and in order to assist them, various services have been set up at many of the state capitols. The first of these is the legislative reference library.[1] The staff of such a library gathers all kinds of material which a legislator may find useful in his work, assembles data on the laws of other states, and often indexes the existing laws and the public documents of the home state. Occasionally it provides special research facilities to aid legislators in the mastery of some specific legislative problem. All but five states (Delaware, New Mexico, North Dakota, Tennessee, and Utah) now have some sort of reference service. In almost all cases where a reference service exists, moreover, the state has provided, in addition, a bill-drafting bureau in which experts actually prepare such measures as the legislators may request. Sometimes this bureau is a part of the reference library service; occasionally it is a separate service; while in other instances the function of bill drafting is the responsibility of the attorney general and his staff. These various facilities have unquestionably contributed to the improvement of state laws, both in form and phraseology, during recent years.

When a bill has been prepared in proper form, the next step is to have

[1] J. H. Leek, *Legislative Reference Work: A Comparative Study* (Philadelphia, 1925).

it introduced. The rules of a legislature usually require that some member shall sponsor every bill that is regularly presented, thereby assuming a technical responsibility for it. This does not mean, of course, that the senator or assemblyman who introduces a bill is personally in favor of it. The requirement of formal introduction by a member is merely a way of making sure that bills are presented in good faith. When requested to do so by some voter or voters in his own district, a legislator will customarily introduce any measure as a matter of courtesy. He does this by writing his name on the bill and depositing it at the clerk's desk. In some state legislatures, a member must go through the gesture of rising in his place and asking permission to introduce a bill, but the permission is never refused. Bills (with certain exceptions) may be introduced in either chamber, but must usually be filed before a certain date, otherwise they can be introduced only under suspension of the rules. There is no limit to the number of bills that any member may bring in.

2. ITS INTRODUCTION IN THE LEGISLATURE.

When bills are introduced, they are given a "first reading," that is, they are read by title only. Thereupon the presiding officer refers each bill to an appropriate committee. Ordinarily there is no doubt as to what committee should have a particular measure. Bills relating to taxation go to the committee on ways and means; those relating to municipal affairs, to the committee on cities. Those affecting the courts go to the committee on the judiciary; those relating to labor are referred to the committee on industrial relations, or whatever its name may be. But occasionally a measure comes forward dealing with some matter which seems to be too broad in its scope for any one committee, or it may be on the border line between the jurisdiction of two different committees. Take the subject of old-age pensions, for instance. Should a bill relating to that matter go to the committee on industrial relations, or to the committee on insurance, or to the committee on social welfare? In such cases, the proposed assignment made by the presiding officer may be discussed by the legislators and possibly overruled. Or a compromise may be made by referring the bill to two committees sitting jointly.

3. FIRST READING AND REFERENCE TO A COMMITTEE.

While awaiting consideration by a committee, the measure is printed, the expense being borne by the state. This is done by the state printing office (if there is one); otherwise by the concern which holds the contract for state printing. No matter how absurd the bill may be, or how long its provisions, it goes into printed form at the public cost. The waste involved in this bill-printing is considerable. Sometimes, at a single legislative session, several

4. PRINTED AND DISTRIBUTED TO MEMBERS.

hundred bills are printed and much of this represents a sheer waste of paper and ink, for most of the measures receive no serious consideration and deserve none. If people who introduce bills were required to pay half the cost of having them printed, there would be a considerable reduction in the number of measures brought in.

THE KINDS OF BILLS THAT ARE BROUGHT IN.

The entire grist of measures which comes to a state legislature each session may be grouped into four classes. First, there are certain bills of broad scope and interest which have substantial backing behind them. They embody real issues and deserve the time that the legislature spends in discussing them. Second, there is a host of measures which, although meritorious, happen to be of a minor sort and do not evoke any general interest — for example, bills affecting some particular city or corporation, or making slight amendments to the school laws, or affecting the duties of some public officer. Third come the "hardy perennials," as they are called — bills which are promoted by some zealot or by some organization of reformers at every session, undeterred by successive defeats. Every state legislature gets its crop of these measures, which include bills to close soda fountains on Sundays, to prohibit the sale of cigarettes, to abolish nickel-in-the-slot machines, to tax bachelors, to legalize a state lottery, to prohibit fraternities in the state university, to abolish all taxes except a single tax on unimproved land, and what not. Most of these bills have no chance of being passed. They are merely a tribute to the persistence of some crusading individual or group.

PERENNIALS AND FREAK BILLS.

THE SELF-INTEREST MEASURES.

Then, in the fourth place, there are the bills to which legislators commonly give the name of "hold-up legislation." These are self-interest measures, designed to give some class, or section, or business group an advantage which it does not possess under the general laws, or which are intended to strike at some other group or interest which has aroused antagonism. Thus, someone introduces a measure requiring every public motor bus to carry a fire extinguisher to protect its passengers in case of accident. The chances are, ten to one, that such a bill is intended to increase the sale of extinguishers rather than to protect passengers. Where public utilities, or banks, or industries offend the politicians, it is a common practice of the latter to retaliate by fathering proposals of adverse legislation which, although not likely to pass, will serve to make the corporations uneasy. The foregoing classes do not exhaust the whole calendar of bills, but they include most of the better-known varieties.

What happens after one of these bills reaches the committee to which

it has been assigned? The first step is to place it on the committee's calendar and to assign a date for a public hearing upon it. When that date arrives, the hearing is held. Advocates and opponents of the measure may appear and argue for and against it. In most states, if not in all of them, anybody who wants to address the committee is accorded this privilege, and naturally the privilege is sometimes abused. Cranks and hobby-riders come and discourse at tedious length, while members of the committee look bored and glance at their wrist watches. A few years ago, one observant legislator noticed that a dapper young man was appearing before some committee every few days and addressing it eloquently on matters which were not always relevant to the bill under consideration. On inquiring why this young man had such a versatility of interest in legislative measures, he received the answer: "Oh, I am not interested in any of these bills. I am a student at the College of Oratory and my teacher told me that this would be a good way to get practice."

5. THE COMMITTEE HEARING AND REPORT.

Sometimes the hearing may take an hour or less; sometimes it may continue all day, or for several days, or occasionally even for weeks, when some very important measure is being considered. Members of the committee ask questions and sometimes get into an argument with the advocates or opponents who appear before them. At any rate, when both sides have had their say, the hearing is closed; then the committee goes into executive session and decides whether it will report favorably or unfavorably. Or it may postpone this decision until some convenient time several days, or even weeks, after the hearing is over. Indeed, the committee may never vote on the matter at all but merely let the bill expire on the table, unless the house votes to take it out of the committee's hands. In some states, however, the rules require that every bill must be sent back to the legislature with a definite report on it.

PROCEDURE AT HEARINGS.

When a committee sends back a bill with its report, favorable or unfavorable, it is listed upon the calendar of the assembly or the senate as the case may be, and in due course comes before the whole chamber. The committee's report is presented for acceptance or rejection. If the committee's report is unfavorable, someone may move that the bill be substituted for the adverse report and given a second reading. The chief debate on the floor takes place at this point: namely, on the question of giving the bill its second reading. If not defeated at that point, it is placed on the calendar for a third reading,

6. THE COMMITTEE'S REPORT PRESENTED.

7. SECOND READING.

8. THIRD READING.

and when it is again reached, a further discussion may take place, although that is not customary. Having passed its third reading, and when it is reached once more, a further discussion may take place, although, again, that is not usual. Having passed its third reading, it is ordered to be engrossed (or put into form for signature by the presiding officer) and is then forwarded to the other chamber.

9. PASSED TO ENGROSSMENT AND SENT TO THE SENATE.

There, it must go through a similar course all over again. If the two chambers have separate committees, there is a further committee assignment; but if the system of joint committees is used, there is no need for this. In any case, the bill gets its three readings in the second chamber, with two more opportunities for a debate. If no amendments are made during these discussions, the measure is attested by the presiding officer of the second chamber and then goes forward to the governor for his consideration. But any amendment, however unimportant, brings the bill back to the original chamber for concurrence; and in case the two houses fail to agree, a committee of conference, representing both chambers, is named to effect a compromise if possible. The compromise is then reported to both chambers and is usually accepted by them. If the conference committee fails to reach a satisfactory compromise, the bill is dead; but relatively few measures perish in conference after they have gotten that far.

BILLS IN THE SENATE.

10. THE FINAL STEPS.

When a measure has run this gauntlet of two committee reports, four debates, and a dozen votes in the two chambers (including votes to reconsider, to postpone, or to amend), one might suppose its troubles to be over. But this is not always the case. After it reaches the governor's desk, he may decide not to append his signature but to veto it, in which case he sends the bill back and it has to be voted on again by both chambers. Then, unless it gets the requisite majority (usually a two-thirds vote) in both houses, it remains vetoed. Or, if the legislative session is near its close, the governor may decide to let it take the "pocket veto," as will be explained in a subsequent chapter.[1]

ACTION BY THE GOVERNOR.

THE LEGISLATURE APPRAISED

By way of brief summary, then, the various stages in the making of a law may be thus enumerated: (1) drafting the measure, (2) bill introduced by some member, (3) given first reading, referred to committee and printed, (4) committee consideration,

SUMMARY.

[1] See p. 679.

hearing, and vote, (5) sent back to legislature and given second reading, (6) given third reading and sent to the other chamber, (7) repeats the same process there, (8) sent forward to the governor unamended or referred back to original chamber with amendments, (9) in the latter case, if amendments are not accepted, goes to committee of conference, (10) report of conference committee adopted by both chambers and bill then sent to governor, (11) if the governor vetoes the bill, it is returned and in each chamber a vote is taken on repassing the measure over his veto.

LAWMAKING A TEDIOUS PROCESS.

Glancing over this outline, it will be seen that the making of a state law is a long process, beset with plenty of pitfalls. It is even longer than the foregoing outline would indicate, because reconsideration may be moved at almost any stage. Points of order may be raised, hostile amendments offered, and roll calls demanded at every vote. There are innumerable ways of obstructing the progress of a measure, when a fighting minority sets out to do it. Hence, important bills often take several weeks, and even months, to go through their various stages. Emergency measures can be rushed through in a few days, but only under suspension of the rules, and such suspension occasionally requires unanimous consent.

THE INTRICATE PROCEDURE DOES NOT GUARANTEE THE QUALITY OF LEGISLATION.

Nevertheless, despite all this intricate procedure, the fact remains that many measures go through the legislature without ever being read by a considerable portion of the members. Sometimes the clerk stands at his desk and wearily drones out the provisions of a measure with nobody listening to him; more often the "reading" of the bill consists in placing a printed copy on each member's desk, where he may or may not look it over. It is a strange but actual fact that various measures go through state legislatures at every session without having been read from beginning to end by a single member except the one who introduced it, and sometimes not even by him. If some legislator, during the debate, queries a particular provision in the bill, everyone turns to this provision and reads it; but as for the rest of the measure, the legislators take for granted that it must be all right if nobody opposes it. Flaws in impending legislation are not usually discovered by the legislators themselves but are pointed out to them by lobbyists. That is one useful purpose which the lobby serves.

"JOKERS."

In short, then, elaborate rules and procedure are depended upon to take the place of patient study and care on the part of those who make the laws. The result is seen in the all-too-common enactment of laws which contain "jokers," or provisions which

on careful scrutiny are not what they appear to be. Provisions inconsistent with each other, and even ludicrous absurdities are sometimes found in bills after they have passed through all their stages. Sometimes these jokers are so palpable that no intelligent man could have read the bill without discovering them.[1] Measures are occasionally passed without enacting clauses or lacking some other indispensable feature. A bill will forbid something in drastic terms and then omit to provide any penalty in case an offender is brought before the courts. These mishaps are not peculiar to any one state. They are more or less common in all of them.

REASONS FOR THE INFERIOR QUALITY OF STATE LAWS.

American state legislation has not set a high standard, either in form or in substance. The popular tendency to look upon law as the remedy for all political, social, and economic evils is one reason for this. Legislation in America has been called upon to perform functions which in other countries are turned over to administrative officials with discretionary power. It takes a dozen laws to do what can be done by one or two orders-in-council or administrative regulations. America is a land of mass production, and the manufacture of laws is no exception. Take the legislature of Indiana as an illustration. It is forbidden by the constitution to prolong its session beyond sixty-one days. But during this relatively short period it usually manages to pass over three hundred laws — an average of five a day. Only supermen could do the job well at that pace, and state legislators are far from being supermen in the Hoosier state or anywhere else. "Let me write the poetry of a nation," said an old-time poet, "and I care not who writes the laws." Indiana, on the whole, has given her people better poetry than laws, although even in law-making she has done as well as any of her sister states.

Much of the trouble arises from the lack of legislative planning. In most of the states little or nothing is done by way of preparation until the legislature meets. Then the governor may send down some suggestions which have been evolved out of his own head, often without any

[1] A few examples:

"If any stallion or jack escape from his owner by accident, he shall be liable for all damages, but shall not be liable to be fined as above provided."

"No one shall carry any dangerous weapon upon the public highways except for the purpose of killing a noxious animal or a police officer in the discharge of his duty."

"All carpets and equipment used in offices and sleeping rooms of hotels and lodging houses, including walls and ceilings, must be well plastered and kept in a clean and sanitary condition at all times."

"Any seven persons, residents of the state, may organize a cooperative association with capital stock . . . provided, however, that not more than one-tenth of said capital stock shall be held by any one stockholder."

"The election shall be held on the Tuesday following the first Monday in November, and on the fifth day thereafter the votes shall be officially tabulated by the board of election commissioners."

real study of the difficulties involved. To remedy this defect, the legislative leaders in some of the states have adopted the practice of getting together for a pre-session conference, sometimes taking the governor into their confidence. Moreover, a majority of the state legislatures provide for various special committees which meet between sessions for the study of particular problems. The activities of such committees may result in valuable recommendations and suggestions for legislative action, but more often the reports and recommendations of these interim committees fail to get very far. One reason for this may be found in the fact that the committees are rarely provided with expert guidance or research service in doing their work.

THE LACK OF LEGISLATIVE PLANNING.

The most promising attack on this problem of better legislative planning is represented by the creation of a body known as the legislative council. This council is usually composed of legislators chosen by the two chambers, although in a few cases some administrative officials of the state are included. With the assistance of an expert research staff, the legislative council prepares a program for the ensuing legislative session and compiles such data and information as are likely to be serviceable to the whole body of legislators when they meet. Eight states [1] now provide for such legislative councils with memberships ranging from five to twenty-seven members. Experience indicates that they are proving helpful in directing the legislature's attention to necessary and important measures, by eliminating needless or undesirable legislation as well as by saving time on the floor of the chamber. Ordinarily much time is wasted at legislative sessions in answering questions which members would not ask if the information were supplied to them in advance. It should be mentioned, of course, that these legislative councils have no power to enact any law. They merely prepare and present measures for the consideration of the legislature when it meets.

THE LEGISLATIVE COUNCIL: A SUGGESTED REMEDY.

Another problem with which all state legislatures have to contend is presented by the various special interests and pressure groups which descend upon them at every session. The representatives of these interests, organizations, and groups, collectively make up what is known as "the lobby" — sometimes facetiously designated as the third chamber of the legislature. Lobbyists by the dozen perennially infest the corridors of the capitol, exploiting every channel of persuasion or pressure to secure the enactment of measures which their employers favor or to defeat measures which the latter oppose. Some of them are

THE LOBBY.

[1] Connecticut, Illinois, Kansas, Kentucky, Maryland, Nebraska, Rhode Island, and Virginia.

interested in worthy social and educational reforms, but most lobbyists are palpably engaged in furthering some personal, corporate, or group advantage. They are seeking something that will benefit the farmers, or organized labor, or big business, or little business, or the banks, the public utilities, the liquor interest, the public school teachers, the war veterans — even the colleges and universities occasionally have their representatives on the job.

ATTEMPTS TO REGULATE ITS EVILS.

Now, if all lobbyists worked openly and confined their activities to appearances at the public hearings of legislative committees, their existence would not present much of a problem. But their methods are often devious and their machinations unscrupulous. Sometimes they threaten a legislator with opposition in his home district if he does not come across. Because of these and other objectionable features in the work of the legislative agents (as they like to call themselves), nearly three fourths of the states have now enacted laws which are intended to regulate lobbying and subject the lobbyists to the glare of publicity. About half of them require that all paid lobbyists shall register, usually with the secretary of state, giving information about themselves and their employers. In addition, about one third of the states require lobbyists to file a statement of all expenses incurred by them in their work, while several other states designate just what methods the lobbyists may legally employ in their attempts to influence legislation. Failure to comply with these requirements will lead to disbarment as a lobbyist, the imposition of a fine, and even to a sentence of imprisonment. These regulations have proved of some benefit, but even when strictly enforced they have hardly sufficed to extirpate some of the evils; and, indeed, it may well be doubted whether any set of regulations, however drastic, will avail to transform the lobby into an instrument of unalloyed beneficence. One defender of the lobby calls it an essential concomitant of democratic lawmaking, with the added remark that "there is lobbying in heaven and hell as well as on earth" — which may be true, although it has never been demonstrated.

A WORD IN CONCLUSION.

Every statute that passes a legislature affords a basis for future amendments, additions, or repeals. "Once begin the dance of legislation," said Woodrow Wilson in one of his whimsical moods, "and you must struggle through its mazes as best you can to its breathless end — if any end there be." Our social and economic conditions, as everyone knows, are becoming steadily more complicated. The task of adjusting legislation to them becomes correspondingly more difficult, requiring better planning, greater caution, more sagacity, more courage on the part of those who make laws of the land, more

efficient machinery for lawmaking, simpler legislative procedure — and perhaps more laws than the average citizen realizes are necessary. Legislators, however, are not improving in quality, nor is the machinery of legislation being greatly bettered. Legislative councils, bill-drafting services, and reference bureaus will help, but the trouble is not merely on the surface; it lies in the very foundations of American state government. More specifically, it is connected with the absence of recognized legislative leadership. The governor tries to lead the legislature, but being an outsider, his activities in this direction are often resented. The presiding officer of the state senate and the speaker of the assembly also try to do it, but not with a great deal of success. A political boss can do it, when there is one, but he has to work under cover. Under such a governmental setup the state legislature usually tries to lead itself; and, when a hundred or more ambitious politicians, in two legislative chambers, endeavor to do this, the result is just about what would happen on the campus gridiron if every player insisted on calling the signals instead of leaving this job to the quarterback. The framers of the early state constitutions were afraid of leadership (which they identified with prime ministers), and fought shy of making any real provision for it. Their successors have inherited this tradition. But it is not a sound one, and state legislation will not easily attain high standards until we accept the principle that legislatures, like all other bodies, do their best work under unified guidance.

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CHAPTER XL

DIRECT LEGISLATION AND THE RECALL

I am certainly not an advocate for frequent and untried changes in laws and constitutions. But I know also that laws and constitutions must go hand in hand with the progress of the human mind. — *Thomas Jefferson.*

The purpose of popular government is to give the people what they want. To help achieve this object is the duty of legislatures and constitutional conventions. But these bodies have not proved themselves in all cases able to meet the popular demand. The people want their laws to fit the age, and they grow impatient with legislatures which move haltingly because of constitutional restrictions, checks and balances, long debates, the retarding influence of pressure groups, the blight of bossism, and the wariness of the lawmakers. So they decide to take the power of lawmaking into their own hands.

WHY DIRECT LEGISLATION SEEMS NECESSARY.

This explains the spread of the procedure known as direct legislation by means of the initiative and referendum. These so-termed "newer agencies of democratic government" afford a means whereby the people can make their laws directly, without the intervention of the state legislature. The initiative is a device by which any person or group of persons may draft a proposed law or amendment to the state constitution, and by securing in its behalf a designated number of signatures, may require that the proposal be submitted to the voters; and, if it is approved by a legal majority at the polls, it goes into effect. In some cases the requirement is that the measure, having been duly signed by a sufficient number of voters, shall be first submitted to the legislature and does not go to the people unless the legislative body declines to accept it. This is known as the *indirect initiative*, in contrast to the *direct initiative* where the proposal goes to the people without prior submission to the legislature. In at least three states, moreover, the legislature, if it wishes, may submit a substitute proposal, along with the popularly initiated proposal, to the voters who then decide whether one or neither of the proposals shall be adopted.

THE INITIATIVE DEFINED.

The referendum, on the other hand, is an arrangement whereby any measure may be submitted to the people by the legislature, or one which has passed the legislature may be withheld from going into force until the people have had an opportunity to express their opinion on it. In the latter case, the withholding requires the filing of a petition signed by a designated number of qualified voters. A distinction should be drawn between the *constitutional referendum*, which is applied to proposed constitutional amendments, and the *statutory referendum*, which applies to ordinary laws. The constitutional referendum exists in forty-six states and is compulsory, that is, the legislature must submit all proposed constitutional amendments to the voters.[1]

THE REFERENDUM.

The first American state to adopt the initiative and referendum as a recognized procedure for the making of laws was South Dakota (1898). In a general way it copied the system used in the cantons of the Swiss Confederation. Other states followed soon after. By the end of World War I, thirteen states had adopted the constitutional initiative; eighteen states had made provision for the initiative and referendum for ordinary laws; and two states, Maryland and New Mexico, had provided for the legislative referendum without the initiative. As movements of such fundamental importance go, therefore, the spread of direct legislation was rapid during the years 1898–1920; but since the latter date it has made virtually no progress at all. Most of the states which adopted the system are situated west of the Mississippi River, a region in which the Progressive movement proved strong during the decade immediately preceding the outbreak of the First World War. Relatively few converts were made among the eastern or southern states, even when the movement was at its height.[2]

THEIR DEVELOPMENT IN AMERICA.

How did this desire for the use of the initiative and referendum originate in the various states? The chief reason for the expansion of direct legislation in America, as has been said, can be found in the impatience of the people with the work of their state legislatures. Surveying this work, the voters in many of the states were forced to the conclusion that, by their own direct action, they could hardly do worse and might do better. Under such circumstances, they did what an electorate always does when confronted with the problem of securing better government. When democracy seems to be working badly, the voters do not shorten sail; they set more sail to the

REASONS FOR THEIR ADOPTION:

[1] This device is discussed elsewhere. See p. 667.

[2] The only states east of the Mississippi which adopted the most extreme device of direct legislation, that is, the direct initiative for constitutional amendments, were Ohio, Michigan, and Massachusetts.

wind. "The cure for the evils of democracy," someone tells them, "is more democracy" — and they believe it. At any rate, it can be set down as an axiom of politics that the people will never blame the people when things go wrong; they will set out to find a scapegoat in some leader, some political party, some law, or some method of doing things. They will change leaders, change governments, change laws, or change methods; but, on this side of the millennium, you won't find a suspicion among the voters that the trouble originates with themselves. A democratic electorate attributes to itself the perfection of Providence — and its ways are sometimes as inscrutable. "You cannot indict a whole nation," said Edmund Burke, and of course a whole nation will never indict itself.

1. THE SEARCH FOR A SCAPEGOAT.

So when legislators, chosen by the people, seemed to be betraying their trust, the voters proceeded to change (not the legislators) the methods of legislation. Resentment over the influence of wealth upon legislation, distrust of professional politicians, the nonfulfillment of campaign promises, the activities of pressure groups and the lobby, along with the feeling that the laws were being made by lawyers in legislatures for the benefit of lawyers everywhere — these things helped to popularize a demand for the change. Likewise, the movement obtained a good deal of support from radical leaders, who believed that it would be easier to obtain social reforms by playing upon the emotions of the electorate than it would be to wangle them out of a double-chambered legislature with a governor's veto power in the background.

2. THE DISTRUST OF LEGISLATURES.

OPERATION OF DIRECT LEGISLATION

Now, as to the actual workings of the initiative and referendum: they are attended by various formalities. No two states have exactly the same requirements, although there is a similarity in essentials. The mode of initiating a proposed law is universally by petition; the method of enacting it (if the legislature does not act in the meantime) is by popular vote. Between the starting of a petition, however, and the ultimate decision of the people at the polls, there is a considerable intervening procedure which will be summarized in the next paragraphs.

The first step in the exercise of the popular initiative is the framing of a proposed law or constitutional amendment. This may be done by anyone; but it is usually undertaken by some organization. A proposed measure relating to labor, or agriculture, or taxation, or the control of public utilities, for example, is initiated by bodies which represent such interests or movements. Then

1. THE INITIATIVE.

comes the quest for signatures. From 5 to 10 per cent of the qualified voters is the usual requirement where a law is proposed; a higher percentage (from 8 to 15 per cent) is ordinarily required if the proposal is for a constitutional amendment. In some cases, however, the percentage is the same. If, accordingly, there are a million qualified voters in the state, the number of required signatures will be from eighty thousand to one hundred and fifty thousand according to the percentage stipulated. In addition, some states require that the signatures be distributed geographically over a certain number of counties or congressional districts in order to discourage purely sectional proposals. It can be seen that obtaining the required number of signatures is no simple task and it often requires the services of professional as well as volunteer canvassers.

PETITIONS AND VOTING.

When a petition has obtained the requisite number of signatures, it is submitted to some designated state official, usually the secretary of state, who checks the names and if he finds them sufficient makes out a certificate to that effect. Occasionally there is provision for the filing of additional signatures in case those on the original petition prove insufficient. Then the measure is placed (usually in abbreviated form or by its title only) upon the ballot at the next regular state election, or at a special election. As many measures may be placed on the ballot as are properly petitioned for, and the legislature may sometimes submit its own proposals in addition. If two conflicting proposals appear on the ballot and both are approved by the voters, it is usually provided that the one receiving the greater number of affirmative votes shall become effective. Ordinarily, a majority of the votes recorded upon the measure is sufficient to pass it; but in a few states it is provided that at least a designated percentage of the total vote shall be cast on the question, otherwise the proposal is not to be regarded as having been accepted by the people.

PUBLICITY PAMPHLETS.

To inform the voters upon the questions submitted to them, publicity pamphlets are prepared in some states and distributed to all registered voters before the polling. Sometimes this pamphlet contains the text of the measures which are to be voted upon, together with arguments for and against each proposal, these arguments being prepared by persons who are designated for the purpose from among the supporters and opponents respectively. It is called a pamphlet, but at times it runs into a booklet of a hundred pages or more. While the expense of printing and mailing these booklets is very considerable, and despite the fact that most of them (especially in the cities) are thrown away without being read, the plan undoubtedly

helps to inform a great many voters and stimulates their interest in the questions submitted.

When a measure has been adopted by the people at the polls, it cannot ordinarily be amended or repealed by any action of the legislature. No measure referred to the people and adopted by them, moreover, can be vetoed by the governor. If a proposal is rejected by the people, it usually may be brought forward by another petition the next year; but this liberty has been found to result in the too frequent submission of the same question. Therefore some states have made provision that a rejected measure may not be brought forward for at least three years, unless a much larger than the customary number of signatures is secured.

2. THE REFERENDUM IN OPERATION.

The referendum follows the same general lines to secure and certify signatures, when the legislature does not itself submit the proposal to the voters. The popular petition, in this case, does not propose a new law, but merely asks that some measure passed by the legislature be submitted to the voters before being put into effect. If a majority of the voters at the polls supports the measure, it then becomes effective; but if a majority votes against the measure, it becomes invalid as though the legislature had never enacted it.

EMERGENCY MEASURES.

The usual requirement is that a measure passed by the legislature shall not go into force for a certain period (usually ninety days), so that opportunity may be given for filing petitions against it. But this requirement might prove to be a serious embarrassment in case of emergency, as, for example, threatened invasion, a general strike, or some state-wide disaster. As a precaution against such an eventuality, it is usually provided that emergency measures, that is, "measures immediately necessary for the preservation of the public peace, health, and safety," may be put into force by the legislature at once. To guard against the abuse of this privilege, however, it is required that the existence of an emergency shall be explicitly stated in the preamble of the measure, and that no emergency law shall be passed except by a two-thirds vote of both chambers in the legislature. In spite of these safeguards, the emergency privilege has been frequently abused. To prevent the invoking of a referendum, the legislature sometimes attaches the emergency provision to measures which have no urgency at all, but which two thirds of its members, for one reason or another, are willing to support. An increase in the salary of some state official, for example, has occasionally been authorized by the use of the emergency provision.

Questions (in addition to the names of candidates) may thus be placed upon the ballot in any one of three ways. First, the legislature may of its own accord refer a measure to the voters for their decision. Second, an initiative petition may be presented bearing the requisite number of signatures and asking that a measure be placed upon the ballot. Third, a law may have passed the legislature but, on presentation of an adequate petition, may be withheld from going into force until approved by the voters. By one or another of these methods a considerable batch of questions is every year submitted to the voters of the various states. In some, the initiative and referendum are used very freely; in others, they are hardly used at all. California has frequently had more than twenty questions on a single ballot, while Massachusetts has rarely had more than two or three.

THREE CHANNELS OF DIRECT LEGISLATION.

THE PROS AND CONS OF DIRECT LEGISLATION

As to the merits and defects of the initiative and referendum, there are wide differences of opinion. These agencies of direct legislation have now been operating in American states for over forty years and they have received, during this period, a trial under sufficiently varied conditions to warrant an appraisal of what they are worth. As a result of this experience a vast array of facts and figures has become available. All this, however, does not help us much because the advocates and opponents of direct legislation insist on interpreting these facts and figures to suit themselves. They are no nearer a consensus of opinion on the merits and defects of direct legislation than they were two generations ago, before we had any experience to draw upon.

MERITS OF THE SYSTEM.

From the welter of pros and cons, however, a few argumentative highlights are worth attention. The reputed merits of direct legislation may be summed up under four heads:

1. *It makes democratic government more democratic.* In legislatures the influence of some class, section, or partisan element among the people has often determined the nature of the laws. The legislators succumb to the influence of the lobby, the boss, the machine, the money power, in other words to the "invisible government," as Elihu Root once called it. This is hardly the place to particularize among legislatures, but the impact of sinister influences upon the process of lawmaking has been far more serious than the average citizen realizes. By the initiative and referendum, it is asserted, the people regain control of their government. Popular sovereignty is thus restored to where it belongs.

2. *It has an educative value.* The average voter takes very little interest in what the state legislature is doing. But people who are called upon to vote upon measures will learn something about them before going to the polls. When the legislators alone make laws, the individual voter feels that he has no responsibility. But when the questions go on the ballot, there is a general public discussion of the arguments for and against. The newspapers devote whole columns to the issues. The questions are discussed before chambers of commerce, boards of trade, luncheon clubs, civic leagues, women's societies, on the radio — everywhere. In this way the whole body of the voters becomes informed on public problems. We have the word of no less an authority than Lord Bryce that direct legislation "is unequalled as an instrument of practical instruction in politics." [1]

3. *It gives the ordinary citizen a chance to make his influence felt.* The legislature, in doing its work, does not hear much from the more or less forgotten man, the plain citizen who attends to his own business and has enough of it to keep him busy. Legislators hear chiefly from the representatives of banks, insurance companies, industrial associations, and public utilities on the one hand, or from labor organizations, farm bureau federations, taxpayers' leagues, and congenital reformers on the other. It is also subjected to pressure by social workers, real estate boards, municipal leagues, public employees, veterans' associations, utopians of all varieties, and, last but not least, by party leaders and politicians. But a considerable part of the population is made up of men and women who belong to none of these categories; they are neither industrialists, reformers, nor politicians. Being unheard from, they are likely to be overlooked. Direct legislation gives this silent section of the electorate a chance.

4. *It keeps legislative bodies on their good behavior and prevents representatives from becoming misrepresentatives.* The initiative and referendum are not intended to supplant lawmaking by legislatures. Most of the laws will continue to be made by the old process. Direct legislation is merely a remedy in the hands of the people for use when the regular lawmaking bodies fail to carry out the popular will. Knowing that the voters have this weapon ready for use, the legislators are more careful about what they do. They realize that an appeal may be taken to the voters and their own decisions overturned. This is an incentive to better work on their part. The best by-products of direct legislation will be found in the laws placed on the statute book by the legislature. Hence, it is argued, the initiative and referendum strengthen rather than weaken our system

[1] *Modern Democracies* (2 vols., New York, 1921), Vol. II, p. 434.

of representative government. Likewise, it is said to heighten popular respect for law, since all legislation, either by the action or inaction of the people, bears the stamp of popular endorsement.

But there are arguments on the other side as well; and these also can be arranged under four headings:

ITS DEFECTS.

1. *Direct legislation weakens the civil rights of the individual.* These rights are embodied in the state constitutions for the purpose of preserving them. They were put there to place them beyond the momentary emotionalism of the populace. But if a majority of the voters can change these constitutions at any time, there is no longer any fundamental security for the liberties of the citizen. This means that there is no special protection for the rights of property, for free speech, or for freedom of worship. A majority can ride roughshod over a minority at any time. When any large fraction of the voters desires something in its own interest, it can organize a campaign and sometimes secure the adoption of laws that are oppressive to everyone but themselves. It may be bad public finance to abolish the sales tax and collect the revenue by increasing the rate of taxation on large individual incomes to an exorbitant figure, but that does not deter great masses of voters from approving such action at the polls if they are given an opportunity. They vote for their self-interest. Thus, direct legislation opens the door to the danger embodied in Alexander Hamilton's warning: "Give the power to the many and they will oppress the few."

2. *Direct legislation is not lawmaking by the people but by a minority of the people.* Not more than 80 per cent of the registered voters ever cast their ballots on election day; the proportion is usually much smaller. Of those who go to the polls, many give all their attention to the candidates and do not concern themselves with the questions at the bottom of the ballot. Hence a measure is often adopted at the polls by the votes of only 25 or 30 per cent of the whole electorate — in other words, by a minority of the people. That is not government by the people, but government by a plurality of the politically active. It may well be doubted, moreover, whether most of those who do vote on the questions really understand what they are voting for or against. They have merely seen the billboards and the windshields of automobiles placarded with the legend "Vote YES on Question 5" or "Vote NO on Question 14"; they have heard it plugged nightly on the radio; and, responding to the influence of reiteration, they do what they are urged to do. This is particularly true of complicated or technical issues which so often find their way upon the ballot — the method of taxing franchises, for example, or the qualifications for admission to the various professions, or the details of a

pension plan for school teachers. To submit such matters to a popular vote is like asking a blind man to solve a cross-word puzzle.

3. *The initiative and referendum merely call for the Yeas and Nays, not for a real expression of public opinion.* What the voter gets is a choice between two fixed alternatives. He may desire neither of them. The system of direct legislation assumes that every voter is able and ready to give a categorical Yes or No to every question of public policy, no matter what it is. The unthinking voter may be able to do this, but very few intelligent people can express their whole opinion, or their exact opinion, by making a cross with two strokes of a pencil. Moreover, in the case of an initiated measure there is no chance to compromise or amend, as in legislatures. The measure must be accepted or rejected just as it stands. Laws should be made by the process of discussion and deliberation, with opportunity for the adjustment of conflicting interest, not by resort to take it or leave it methods.

Finally, *the initiative and referendum place an added burden upon the voters.* They lengthen the ballot, increase the expense of elections, and are a joy to every fanatic who wants to put his hobby before the whole people at the public expense. Moreover, as is well known to every practical politician, you can sell a legislative nostrum to the populace just as you sell a brand of chewing gum, or coffee, or tooth paste: namely, by persistently advertising it. And advertising is merely a matter of spending money. Hence, the initiative and referendum give a distinct advantage to those proponents of any measure who have the funds and are willing to spend them in organized propaganda — using the newspapers, the billboards, the motion-picture flash, and the radio "plug" for this purpose. As for the ordinary citizen who has no one to organize him and spend money on his behalf — he does not stand to gain much from these assertedly democratic proceedings.

THE WEIGHT OF THE ARGUMENTS.

These are the chief arguments, for and against, as they are commonly put forth by the two sides. The supporters of direct legislation magnify its merits; the opponents overstate its defects. Direct legislation has not ended the power of political bosses, or destroyed the party system, or eliminated the influence of the pressure groups, or made all the laws as righteous as the Ten Commandments. Lawmaking continues to be something of a racket, with organized minorities endeavoring to bludgeon people in the people's name. On the other hand, direct legislation has not led to the unbridled rule of the demagogue nor has it seriously impaired the fundamental rights of the citizen. Laws passed by means of the initiative and referendum have been, on the whole, no better and no worse than laws passed

by legislatures. The probability is, if one may venture a guess, that less use of direct legislation will be made as time goes on. This does not mean, however, that the system will be valueless. It still remains a highly important weapon of last resort which the people can use if they need it. At any rate, no one need hesitate to make up his mind on the general issue, for he will find himself in good company whichever side he takes.

THE RECALL

Commonly associated with direct legislation is the recall. It may be defined as the right of a designated number of voters to demand the immediate removal of a governor or any other elective officeholder, and to have their demand submitted to the voters for decision. A petition for removal, stating the reasons for the desired action, is drawn up and circulated for signatures; when enough signatures (usually a number equal to five per cent of the registered electorate) have been obtained, the petition is submitted to the proper authorities who thereupon order an election to decide the matter. If a majority of the voters pronounce in favor of the recall, the official steps out at once; otherwise, he continues in office. In some states, the voters express themselves on the recall and at the same time vote for a successor; in others, there is a second election in case the recall succeeds. In this second election the ousted official is sometimes permitted to run as one of the candidates; and if the majority opposing him is distributed among several other candidates, he may succeed in securing reelection.

OPERATION OF THE RECALL.

At least eleven states now make provision for the recall of some officials. Unlike impeachment, which is a semijudicial proceeding normally used to rid the government of an official guilty of criminal acts, the recall is a political instrument designed to secure stricter official accountability to the electorate. It enables the people to oust any officeholder who fails to fulfill his trust. It makes official responsibility continuous and direct. On the other hand, the recall is a weapon which may easily be turned to wrongful use. If resorted to frequently and without good reason, it could make official tenure so uncertain as to deter the right sort of men and women from accepting public office at all. But it has been, in fact, very little used. Since its introduction in 1908, only one governor and a half dozen other important state officials have been recalled, which would seem to indicate that it is generally looked upon as a weapon to be held in reserve for emergencies rather than for routine use. It is like a fire escape on the

ITS PURPOSE.

exterior of a building — very useful and even a lifesaver when you need it; but something that would become a considerable nuisance if everyone decided to use it as a regular stairway.

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CHAPTER XLI

THE GOVERNOR

A government that is ill-executed, whatever it may be in theory, is in practice a bad government. — *Alexander Hamilton.*

Every state of the Union has established an executive department, independent of the legislature. This executive department consists of a governor and various state officials such as the lieutenant governor, secretary of state, treasurer, attorney general, auditor, and superintendent of education. In addition, each state has various administrative officers (bank commissioner, superintendent of charities, state librarian, fish and game commissioner, etc.) and a number of administrative boards, such as a board of health, a public utilities commission, a highway commission, a board of agriculture, a prison board, etc.

ORGANIZATION OF THE STATE EXECUTIVE DEPARTMENT.

What is the difference between an executive official and an administrative official in state government? It is this: the executive branch of the government is established by the state constitution and consists of high officers who have a considerable range of discretionary power. Their functions are usually set forth in the constitution and cannot be controlled by the legislature. The administrative positions in state government, on the other hand, have mostly been created by law, and hence their duties are determined by the legislature. But the line between the two is not hard and fast. In some of the state constitutions, there are provisions relating to officials and boards which in other states are left to be dealt with by statute. In common parlance the higher state officers are called executive while the lower ones are called administrative.

EXECUTIVE AND ADMINISTRATIVE WORK.

The governor is the chief executive officer in state government. He occupies the oldest executive office in America. More than three hundred years ago, before the first colonial assembly was called into existence, the position of governor made its appearance in Virginia, and it has continued as a New World institution ever since. Each of the thirteen colonies had a governor before the Revolution, and when the colonies became states they pro-

THE OFFICE OF GOVERNOR: ITS HISTORY.

vided in every case for continuing the office. In some of them the function of electing the governor was given to the people, but in the majority of the thirteen original states it was left with the legislature. Gradually, however, this plan of legislative election was abandoned, and today the governor is universally chosen by popular vote.[1]

HOW GOVERNORS ARE CHOSEN.

Candidates for the office of governor are nominated in most states by state-wide primaries; but in some states, for example, New York and Connecticut, the nominations are made by state party conventions composed of delegates from counties or assembly districts. No one but a citizen is eligible as a candidate for the governorship; there is usually a requirement of at least five years' residence in the state, and the customary minimum age limit is thirty years. The election is by secret ballot, and a plurality of votes is ordinarily sufficient to determine a choice at the final polling. In a few states, however, a clear majority is required; otherwise the choice is made by the two houses of the state legislature in joint session.[2] The election of the governor is everywhere a party contest; but in states where one political party controls a large majority, as for instance in most southern states, the real contest takes place at that party's primary, and the subsequent election is a mere formality.

TERM AND METHOD OF ELECTION.

The governor's term is either two or four years in all the states but one. It is two years in twenty states, four years in twenty-seven states, and three years in New Jersey. Gubernatorial terms have been lengthened from two to four years in quite a number of states in recent years, and the tendency is distinctly in that direction, the longer term being particularly desirable in states where the legislature meets in regular session only once in two years. Reelection of an incumbent governor is a common practice. Nevertheless, there are thirteen states which deny an incumbent governor the privilege of succeeding himself; there are three more which allow only two consecutive terms; and one state, Tennessee, limits a governor to three consecutive terms. Salaries range from three thousand dollars in South Dakota to twenty-five thousand dollars in New York, and at least fifteen states pay their governors ten thousand dollars or more. In addition, all states provide for certain allowances to defray official expenditures.

[1] Mississippi might be considered an exception to this statement. In that state each county is assigned an electoral vote for governor equal to its representation in the lower house of the state legislature. The entire electoral vote of a county is given to that candidate who receives the largest plurality of popular votes in the county. To secure election, a candidate for governor must secure both a majority of popular votes cast and a majority of the total electoral votes in the state.

[2] Georgia, Maine, and Vermont; in Mississippi, in case no candidate obtains a clear majority of the popular and electoral votes, the lower house of the legislature elects.

All the state constitutions make provision for filling the governor's post in case it should become vacant during the term for which he was elected.

REMOVAL OF GOVERNORS BY IMPEACHMENT.

Such vacancy may occur by reason of the governor's death or through his removal by impeachment. The lower house of the legislature, following the federal analogy, has the power to begin impeachment proceedings, while the upper house hears and determines the issue. Occasionally, however, as in New York, the justices of the highest state court sit with the upper chamber during the trial. A verdict of conviction, which usually requires a two-thirds vote, ousts the governor from office and may disqualify him from ever again holding any civil office in the state. As a matter of history, few governors have been removed from office in this way — only three or four within the past sixty years.

As explained in the previous chapter,[1] eleven states make it possible to have the governor removed by means of a recall election. A petition

REMOVAL BY RECALL.

bearing a designated number of signatures must be filed requesting that the matter of removing the governor be submitted to the voters at an election.[2] Reasons, as a rule, must be given in the petition for the governor's recall, but they need not amount to allegations of misconduct, such as would be required for his impeachment. As already pointed out, actual removals by recall have been few. Only one governor has been removed by this means; that was Governor Lynn J. Frazier of North Dakota, who was recalled by the voters in 1921, following an attempt to introduce various aspects of agrarian socialism in that state.

When a governor is convicted on impeachment, or dies in office, or resigns, he is succeeded in about two thirds of the states by the lieutenant

HOW A VACANCY IN THE GOVERNORSHIP IS FILLED.

governor. This official is ordinarily chosen for the same term as the governor and by the same process of popular election. His main function, apart from that of being the governor's heir apparent, is to preside in the state senate. In a few states he does not have this function but is the presiding officer of the governor's council. Failing the lieutenant governor (or in states where there is no such officer), the succession to the governorship descends upon the secretary of state, or the president of the state senate, or the speaker of the lower chamber, as the state constitution may provide. If a governor is removed by means of the recall, however, this order of succession does not go into effect. His successor is chosen

[1] See pp. 672–673.

[2] For a full discussion of the procedure followed in one of the states, see F. L. Bird and F. M. Ryan, *The Recall of Public Officers: A Story of the Operation of the Recall in California* (New York, 1930).

by the people either at the time of the recall or at a special election soon afterwards.

THE GOVERNOR'S POWERS IN RELATION TO LEGISLATION

THE GOVERNOR'S POWERS: LEGISLATIVE.

The powers of the governor are for the most part executive powers. The theory of American state government is that a governor has no legislative functions, and some of the state constitutions expressly prohibit him from exercising any. But in this case, as in so many others, the practice of government has run away from its design.[1] The governor's participation in lawmaking is, in fact, both extensive and active everywhere — no matter what the constitution permits or prohibits. Anyone familiar with the realities of state politics can give you plenty of illustrations. The governor may call special sessions of the legislature. At such sessions, as a rule, the legislature can consider no matters except those specified in the call. Even at regular sessions the governor initiates legislation, promotes it, often pushes it through both chambers by the weight of his official influence, and signs it after it has passed. He is at all times potentially, and much of the time actually, a participant in the lawmaking process.

HOW HE SECURES HIS LEGISLATIVE INFLUENCE.

Why do we have this palpable contradiction between the theory and practice of state government? The constitution of Massachusetts, for example, declares that "the executive shall not exercise legislative or judicial power or either of them," yet every governor of Massachusetts proposes laws in his messages to the state legislature, actively urges them, and uses his influence to ensure their passage. In other states the chief executive is similarly active in the process of lawmaking. The governor, as a matter of fact, exercises more real legislative power than any dozen members of the legislature. "More than half my work as governor," wrote Theodore Roosevelt, "was in the direction of getting needed and important legislation."

A CURIOUS ANOMALY.

The reason for this may be found in the close relation which exists between lawmaking and the party system. Members of state legislatures are elected on a party basis, pledged to carry out the platform of their party. And as a rule, though not always, the governor is the recognized leader of the party which controls a majority in the legislature. When, therefore, the governor insists that some particular measure be passed or rejected, he does not speak as the executive head of the state government but as the

HIS INFLUENCE AS A PARTY LEADER.

[1] H. C. Black, *The Relation of Executive Power to Legislation* (Princeton, 1919).

leader of his party in the state. His recommendations may be communicated to the legislature in formal messages, or informally by conferences with prominent members of his own party in the legislative chambers. The latter is the way in which the governor exercises most of his influence upon lawmaking. Outwardly he may appear to be keeping his hands off, while day by day in his private office he is dexterously pulling the strings to get what he wants.

THE SPELL OF HIS INFLUENCE WITH INDIVIDUAL LEGISLATORS.

Members of the legislature, moreover, are under the spell of a governor's influence. They are interested in appointments which he is going to make; they are concerned about the passage of bills which will come before him for assent or veto; they have a real interest in appropriations which he may or may not recommend. By the strategical use of his executive discretion in these matters, a governor can, if he so desires, put pressure on senators and assemblymen to help him with his own legislative program. Legislators are human, and the governor has his loaves and fishes to distribute.

HIS APPEAL TO THE ELECTORATE.

Moreover, if worst comes to worst, the governor can appeal unto Caesar. He can arouse public opinion against the willful men who are obstructing his efforts to carry out his pledges. He can send statements to the newspapers in denunciation of the obstinate legislators, or he can betake himself to a radio station and give them an ethereal panning. He can always get his side of the case before the people, while the legislators have no effective way of making a reply. There are too many of them and their babel of rejoinders only confuses the public ear. The governor has a great advantage in all this, for his own mind is unanimous whereas that of the legislature is not. A house divided against itself cannot stand — which is true of a house of representatives. Thus the governor's activity in lawmaking is not founded on constitutional theory but on the logic of facts. If you desire to know how extensive this power is, do not look for it in the state constitution. Just go to the state capitol and watch the legislators flitting in and out of the governor's antechamber. Then listen to what they say on the floor.

THE GROWING CONSTITUTIONAL POWERS OVER LEGISLATION.

Of course the power of the governor in legislative matters is by no means entirely the product of usage or the result of personal or partisan influence. State constitutions at the present time are becoming generous in the specific powers relating to legislation which they entrust to the governor. The framers of the thirteen original state constitutions were afraid of executive tyranny. This fear was a legacy from colonial days when the governor had to carry out the high-handed instructions which came to

him from England. At any rate, governors were in ill repute during the years immediately following the Revolution, and in the constitutions of the thirteen original states the governor's office was reduced to one of relatively small importance. As Madison expressed it during the debates in the federal convention of 1787: "The executives of the states are in general little more than ciphers; the legislatures omnipotent." But, in due course, legislatures encountered their season of unpopularity and whenever state constitutions were revised, or new ones adopted, the governor's powers were enlarged.[1] For example, the veto power was withheld from him in most of the original thirteen state constitutions because it seemed to be too despotic a power to be placed in the hands of any one man. But having been given to the President by the federal Constitution, the idea of placing a similar power in the hands of the governor gradually gained in public favor, and one state after another adopted it during the course of the nineteenth century. Today the governor has a power of veto in every state except North Carolina.

ORIGIN AND DEVELOPMENT OF THE VETO.

In principle and in practice, the governor's veto power and the veto power of the President are much alike.[2] With a few exceptions every bill or resolution which passes both houses of the state legislature must be presented to the governor for his signature. Like the President, he has three options: he may sign it, or within the prescribed period send it back without his signature, or do neither. In the first case, it becomes a law. In the second case, it does not become a law unless both houses of the legislature, by a prescribed majority (usually two thirds or three fifths) pass the measure over his veto. In the third case, at the expiration of the prescribed time (from three to ten days) it becomes a law without the governor's signature, provided the legislature does not in the meantime end its session, in which case it does not (in some states) become a law but receives the "pocket veto." In a few of the states which have no pocket veto, the provision is that if the legislature adjourns before the time limit for a regular veto has expired, the governor may withhold his assent and send measures back at the beginning of the next session, otherwise they become laws. Most of them, however, do not have this arrangement but provide that when the legislature adjourns within the time limit, such action automatically kills all bills which the governor does not subsequently approve.

HOW THE VETO POWER IS EXERCISED.

[1] M. C. Alexander, *The Development of the Power of the Executive in New York* (Northampton, Massachusetts, 1917), and Charles J. Rohr, *The Governor of Maryland: A Constitutional Study* (Baltimore, 1932).

[2] For example, see N. H. Debel, *The Veto Power of the Governor of Illinois* (Urbana, 1917).

During a legislative session the governor has a relatively short time in which to make up his mind whether he will sign or veto a measure — sometimes only three to five days. This is long enough when bills come to him one at a time. But in the closing days of a session they arrive by the dozen — sometimes twenty or thirty in a batch. Of course it is impossible for any governor to examine all these bills within the time allotted. Moreover, it is particularly important that these bills be given careful consideration by the governor, for they are the product of the end-of-the-session rush when many measures are enacted en bloc with the legislature's normal procedure suspended and with only cursory attention to the details of a measure. They are also the product of those final weeks which are most auspicious for pushing through special legislation that would encounter difficulty if the legislature were proceeding at a more leisurely pace. Hence, many of the states provide that the governor shall have a longer leeway, sometimes thirty days, in which to sign or veto bills after the legislative session comes to an end. This is a sensible provision and one which all the states ought to make, unless they can find some way of reducing the congestion of bills in the closing days of the session.

THE LEEWAY AT THE END OF THE SESSION.

The President of the United States cannot veto individual clauses or items in any measure passed by Congress, but in most of the states the governor has the right to veto individual items in appropriation bills. In Washington and South Carolina, moreover, this right of partial veto has been extended to any legislative measure which contains items or sections; and in Oregon the governor is permitted to veto items in bills which declare an emergency to exist, apparently in order to permit him to checkmate the legislature should it try to prevent a popular referendum on its measures by indiscriminately labeling them "emergency measures." [1]

THE POWER TO VETO PARTS OF A MEASURE: ITS MERITS.

The partial veto is a very useful one, particularly in the case of appropriation bills. It means that a governor is not faced with the alternative of letting an objectionable item pass or else tying up the entire list of appropriations, as he must if he has only a blanket veto. Moreover, the partial veto establishes more clearly the governor's responsibility for fiscal matters. It makes him a consenting party to every dollar that is spent — save in those cases where the legislature passes an item over his veto, a rare occurrence since appropriation measures are usually passed at the end of a legislative session and the governor's veto is thus normally absolute.

On the other hand, the practice of giving the governor power to strike

[1] See p. 667.

out, or reduce, individual items in an appropriation bill has developed some objectionable features. It has occasionally enabled a governor to put undue pressure on those legislators who are deeply interested in particular appropriations and who consequently find it prudent to help the governor on other measures in order to keep him from wielding his axe in retaliation. Likewise, it has sometimes encouraged the governor's opponents to put into an appropriation bill all sorts of favors for their own districts so that the governor may incur the odium of striking them out.

OBJECTIONS TO IT.

Executive vetoes have been much more frequent in state than in the federal government. They are much more common in some states than in others. Occasionally the vetoes run as high as 10 per cent of all the measures passed. Much depends, of course, upon the relations between the governor and the legislature as respects their party affiliations. A governor uses his veto power more freely upon a hostile legislature than upon one which his own party controls. Yet the entire number of measures vetoed in whole or in part is seldom a large fraction of the total number which come to the governor's office for approval; and of those that are guillotined by the chief executive, a good many are intended by the legislature to meet this fate. Legislatures often pass measures in order to get themselves out of a predicament and get the governor into one. A state senator was once asked how he managed to keep himself so well entrenched in his district and get reelected term after term. "I never vote in favor of a tax or against an appropriation," he replied. "I let the governor balance the budget and take the rap. That's what he's paid for."

WORKINGS OF THE VETO SYSTEM.

It is not by his vetoes alone that the governor manages to stall legislation of which he does not approve. A hint from his office that some measure, if passed, will not receive the executive signature is often quite sufficient to prevent its further progress in the legislature. Senators and assemblymen who are in charge of measures often inquire from the governor what his attitude is likely to be, and are sometimes told that changes must be made or a veto will be forthcoming. Thereupon they bestir themselves to get their bills amended before final enactment. Occasionally a measure is recalled by the legislature for some amendment after it has gone to the governor's desk but before he has acted upon it. And in a few states the governor has been given the right to suggest amendments by officially transmitting them to the legislature before the final vote is taken. It is true, of course, that the legislature can defy the governor by passing any measure over his veto, and this it sometimes does; but rounding up the requisite additional

THREATS OF VETOES.

votes for this purpose is not easy. Taking the states as a whole, it has been estimated that less than five per cent of the bills vetoed by governors are ever repassed by the required majority.

THE GOVERNOR'S ORDINANCE POWERS.

Like the President, the governors have developed a good deal of power through the issue of executive orders. Many state laws are passed in general terms, leaving it to the governor to provide the detailed arrangements. This is desirable in order to give the laws a reasonable degree of flexibility. Thus, for example, the state legislature may provide that deer or partridge must not be killed during a season of more than three weeks in any year, leaving the governor to fix by proclamation the exact days on which the hunting seasons shall open and close. Or it may stipulate that some special commission shall be appointed and shall have such allowance for expenses (not exceeding a certain sum) as the governor may approve. Such executive orders do not constitute legislation in the ordinary sense, but they have the force of law and they serve to relieve the legislature from consideration of numerous details.

THE GOVERNOR'S EXECUTIVE POWERS

PRINCIPAL EXECUTIVE POWERS:

From what has been said in the preceding paragraphs, it should not be assumed, however, that governors are principally concerned with legislation. They devote their principal attention to executive work. This work is varied in character but most of it can be grouped under seven heads: (1) appointments and removals, (2) the general oversight of state administration, (3) financial functions, (4) military functions, (5) duties in relation to the federal government and to the other states, (6) the granting of pardons, and (7) miscellaneous.

1. THE APPOINTING POWER.

The appointing power of the governor is great, and it is steadily growing. Many state constitutions stipulate that the governor shall appoint certain designated officers and "all others whose appointment or election is not otherwise provided for." At one time most of the higher state officials were chosen by the legislature, but now very few are selected in that way. Subsequently the practice of choosing such officials by popular election attained considerable vogue and it still has a strong grip in some states as respects a number of the higher administrative officers; but in many others these posts, or some of them, are now filled by persons whom the governor appoints. This is particularly true of boards which have technical tasks to perform, such as state boards of health or public service commissions. Heads of executive departments (e.g., the state treasurer and the attorney

general) which have been established by the state constitution, however, are still generally elected by the people. In the exercise of his appointing power, in any event, the governor is usually subject to limitations, that is to say, his appointments are not valid until confirmed. The confirming authority is ordinarily the upper chamber of the state legislature; but in exceptional cases, especially in the New England states, it is the governor's council.

CHECKS UPON THE APPOINTING POWER: (a) CONFIRMATION BY THE SENATE, ITS ORIGIN AND MERITS.

This practice of subjecting the governor's appointments to confirmation is one that harks back to the days of implicit confidence in the principle of checks and balances. Fearing "one-man power" and the abuse of executive authority, the makers of state constitutions put various restraints upon it. And in many cases this requirement of confirmation has proved a wholesome check upon governors who otherwise would have repaid their own personal or political obligations by giving their supporters a lodgment upon the public pay roll. It has availed at times to prevent governors from using their patronage as a means of building up political machines.

ITS OBJECTIONABLE FEATURES.

But just as frequently, on the other hand, the requirement of confirmation has been used to balk a governor's plans for improving state administration by the appointment of honest and capable officers. The confirming power is a weapon which a partisan state senate can hold over the governor's head, forcing him to withhold vetoes or to recommend expenditures in which individual senators are interested. Whether there have been more examples of salutary restraint or of senatorial intimidation is hard to say. With the right sort of a governor, no confirmation would be needed; with the wrong sort, it is doubtful whether the requirement of confirmation will keep him from bargaining his appointments through. The outstanding defect of the system is that it permits an evasion of responsibility for appointments. In municipal government, the power of confirmation, which remained for many decades in the hands of aldermen or councilors, has been generally abolished, all responsibility for appointments being thereby concentrated in the mayor. The results have been advantageous.

(b) CIVIL SERVICE RULES.

The common check upon the governor's appointing power is the civil service or merit system of appointment. About twenty states now have state-wide merit systems; others have systems applicable to particular administrative departments. Normally the restrictions of the civil service laws do not cover the heads of departments and other high officials. They apply to subordinate

appointments only. Where there is a civil service or merit system, the governor does not have full discretion as regards these minor positions. He must make the appointments from "eligible lists" which are prepared as the result of examinations held under the auspices of a civil service or personnel board or department. These examinations are usually open only to residents of the state, and eligible lists containing the names of those who stand highest are then certified to the head of the department in which the position is to be filled.

OBSTACLES TO THE MERIT SYSTEM.

But this system has encountered various obstacles of a practical sort. Sometimes it has been administered by pliant civil service boards which manage to find loopholes through which the protégés of the politicians can be slipped into office. Legislatures have also interfered in some instances by providing that former service men must be given a "veterans' preference," that is, they must be placed at the head of the eligible lists, or given a substantial extra credit, if they pass the tests at all. This creation of a privileged order has had a depressing effect upon the whole merit system. Unfortunately, moreover, it is the failures in other lines of work who too frequently become candidates for positions in the public service. Capable and self-reliant young men and women rarely go hunting for minor government jobs; they are looking for something that offers a better opportunity of advancement. Accordingly, it sometimes becomes difficult to select a a single first-class appointee from a whole roomful of applicants.

PROMOTIONS.

The civil service system would bring better results if greater efforts were made to recruit high-grade candidates for the examinations. Merit, moreover, should determine not only appointments but promotions. Thus far, it has had relatively little to do with promotions, and hence there is little incentive to exert one's self after getting into the service. Promotions continue to be made, for the most part, on a basis of seniority, or political influence, or the personal favoritism of department heads. When promotions are made, the public employee who has worked diligently often finds himself superseded by someone who has spent his time making friends among the politicians.

Some system of promotion based upon efficiency ratings ought to be devised; but, although several attempts have been made in this direction, none has as yet proved altogether successful. Nor is it easy to devise a fair and workable plan, for general merit in a public employee is something that cannot be measured by any mechanical scheme of ratings, plus and minus. On the other hand, unless the mechanism is made inflexible, you will find that political favoritism creeps in. Give the appointing authority the right to depart from the fixed routine and the danger is

that he will show partiality under the guise of "placing emphasis on character and personality."

REMOVALS.

Along with the power of appointment goes the right to suspend or remove state officials. Authority to suspend an official from office appertains to the governor in most of the states, but governors do not, as a rule, have unrestricted power to remove even those officials whom they themselves appoint. Charges must usually be filed, hearings given, and in some states the concurrence of the upper chamber of the state legislature is required. Here, again, the restriction has often availed to forestall arbitrary and unjust removals, but quite as often it has served to keep in office men of political influence whose general inefficiency and indolence amply warranted dismissal. When officials are appointed under civil service rules, moreover, they may be removed only by compliance with such formalities as the laws prescribe. These usually afford adequate protection against dismissal for reasons other than actual misconduct or gross incompetence.

2. THE GENERAL OVERSIGHT OF STATE ADMINISTRATION.

Second, the governor is charged with a general supervision over the enforcement of the laws and the conduct of the state's administrative affairs. Just how much actual authority he can exercise in this capacity depends in part upon the personality of the governor and in part upon the nature of his legal relations with other state officials. A dominating personality in the governor's chair, if he has public opinion as an ally, will usually compel other state officials to help carry out his policy, no matter how independent of his actual control they may be. His prestige and authority as a party leader can also be helpful in this direction.

FUNCTIONS IN THIS SPHERE COMPARED WITH THOSE OF THE PRESIDENT.

Yet from a constitutional point of view, the governor's executive supremacy in state government is far from being so complete as is that of the President in national affairs. It is here, more than at any other point, that the analogy between the two positions fails to hold. The President appoints the heads of the national departments and the members of all the national administrative boards; and though the Senate must often confirm these appointments, it rarely thwarts his will. He can remove the heads of the national departments at his discretion. His control over them is well recognized, and his responsibility for their actions is complete. In law and in fact, a federal department head is virtually the *alter ego* of the President. But the heads of the state departments of administration, in many instances, are not chosen by the governor, and they normally cannot be removed by him except with the consent of the state senate or after a hearing. Some of them are elected by the voters

and their mandate has the same popular significance as that of the governor. When a governor comes into office, moreover, he usually finds various high officials and members of administrative boards who were appointed by his predecessors and whose terms have still some years to run. His control over the actions of such men must at best be imperfect and incomplete. To be sure, as we shall see in a subsequent chapter,[1] a considerable number of states have reorganized their administrative structures in recent years; and in most instances where such reorganization has been effected, there is considerably less difference between the positions of the governor and the President in the control of their respective administrations than formerly. But whatever the actual situation, the average citizen does not take into account the practical limitations on the governor's powers but holds that officer responsible for the entire conduct of the state administration.

3. FINANCIAL POWERS.

Third, the governor has been acquiring, in some of the states, financial powers of great importance. Until two or three decades ago the annual appropriation bills were drafted, in almost all cases, by committees of the legislature. They were put through one by one and were not embodied in a consolidated budget. But, more recently, a reform in the making of appropriations has gained headway and many of the states have installed a regular budget system. In most of these states, moreover, the function of preparing the annual budget and of transmitting it to the legislature has been given to the governor or to some official under his control. No more need be said on this topic at this juncture for it will be fully discussed a little later.[2]

4. MILITARY POWERS.

Fourth, the governor has certain military powers, but these are not now so extensive as they used to be. Nominally he is commander in chief of the state militia, or national guard, and of the state guard, which is usually organized when the national guard is called into the federal service. As commander in chief, his functions are determined by law, but for the most part they are actually performed by an adjutant general or some similar officer. The governor may appoint the officers of the militia or other armed forces of the state, unless the state constitution directs differently, or the legislature makes some other provision, as it often does. Each state has a body of laws relating to the organization of its public forces, and these laws, like all other laws, are for the governor to carry out according to their tenor. When the state militia or national guard is mustered into the federal service, the governor ceases to have anything to do with it; and, even in time of peace, the authority of the federal war department over the state

[1] See pp. 744–756. [2] See Chapter XLIII.

militia is now very extensive, having been made so by a recent army reorganization act.[1]

AID TO THE CIVIL AUTHORITIES.

Usually the state constitution and laws authorize the governor to call out the militia in time of riot or other civil disorder. This may be, and commonly is, done on the request of the mayor or other executive head of any municipality in which a serious disturbance has arisen, but governors as a rule have the right to act upon their own initiative as well. When the aid of federal troops is required by any state to quell internal violence, the governor may call upon the President of the United States for this assistance, provided the state legislature is not in session. If it is in session, the legislature by resolution makes the request for federal troops. Bear in mind, however, that the President may send federal troops into any state to preserve order, without request from either the governor or the legislature, if the disturbance is impeding the exercise of federal functions, such as the carrying of the mails or the collection of customs duties. To cope with disturbances which are not sufficiently serious to require the aid of troops, many of the states have established a state police force or constabulary. These bodies of well-disciplined men can be quickly mobilized to deal with disorder which gets beyond the control of the local authorities in any part of the state. They are at the disposal of the governor when an emergency arises.

5. FUNCTIONS IN RELATION TO THE FEDERAL GOVERNMENT.

Fifth, there are powers and functions which the governor exercises in relation to the federal government and the other states. He has become the recognized medium of official intercourse between his own state and the federal authorities. When the national government has anything to say to the states, it communicates through the governors. Proposals to amend the national Constitution, for example, after they have been initiated by Congress, are addressed to the governor by the secretary of state at Washington and the governor, in turn, notifies that official whenever the legislature of his state takes favorable action on a proposed amendment. Moreover, the governor is the official addressed by the national government whenever the informal cooperation of the state in carrying out some national program is sought.[2] It is the governors whose aid has been sought in setting up draft boards and other volunteer agencies to assist in national defense, and it is the governors who have been addressed by the national authorities to secure the aid of the states

[1] See pp. 492–493.

[2] See the article by A. N. Holcombe on "The States as Agents of the Nation" in *Southwestern Political Science Quarterly*, I, pp. 307–327 (March, 1921).

in setting up relief agencies to combat an economic depression. Not as a matter of constitutional obligation but as voluntary cooperators in a common cause, the states have become, in many enterprises, the agents of the nation.

AND TO THE OTHER STATES.

The governor is also the channel of official communication between his own state and other states. His functions in relation to the rendition (or extradition) of fugitives from justice have already been referred to.[1] When one state desires to sue another in the Supreme Court, a statute authorizing the suit is usually passed by the legislature; but the governor is regarded as having authority, on his own initiative, to institute any such suit for the protection of his state. He is also supposed to do what he can in the way of keeping his own state on good terms with the other states.

THE GOVERNORS' CONFERENCE.

In this connection, one may mention the governors' conference, to which allusion has already been made.[2] It is held each year to consider questions of common interest to the states. Originally, it was hoped that these annual conferences would promote uniformity of legislation among the states, but this hope has hardly been justified. The reason may be found in the fact that the conferences have tended to develop into social outings for the busy chief executives who attend them. They have served a good purpose, however, by providing a place for the interchange of opinions concerning a variety of state problems.

6. THE POWER OF PARDON.

Sixth among the governor's executive powers is the power to pardon or reprieve offenders who have been convicted in the state courts. Pardons may be either absolute or conditional. But the governor's pardon power is not everywhere unrestricted. In many of the states the power to pardon rests with the governor alone, but in a number of them his authority has been limited by the requirement that he must act in conjunction with a board of pardons or with some similar body.[3] One reason for limiting the governor's discretion in matters of executive clemency is the fear that it may be used by a governor for personal or political ends. Some governors, indeed, have used their pardoning power too freely and unwisely. It should be emphasized that a governor has no authority to pardon anyone who has been convicted in a federal court. That power belongs to the President.

[1] See pp. 602–604.

[2] See pp. 606–607.

[3] For a full account see Christen Jensen, *The Pardoning Power in the American States* (Chicago, 1922).

Finally, the governor has various powers which must be classed as miscellaneous because no other designation will cover them. He may issue an order for a special election whenever a vacancy occurs in the legislature; he appoints a United States senator if a vacancy occurs when the state legislature is not in session (provided it has authorized him to do so); he is ex-officio a member of various state boards and commissions; he attends a large number of official functions; receives distinguished visitors who come to the state capitol; reviews parades; signs documents by the hundreds; holds conferences with party leaders; listens to applicants for appointments (and to their insistent friends); and makes a speech somewhere every few days. He listens to the requests of delegations and ploughs his way through reports of pitiless length. Between times he dedicates new public buildings, graces the head table at banquets, receives honorary degrees at college commencements, and squeezes in a little home life if he can.

7. MISCELLANEOUS POWERS.

From all of which it will be realized that the office of governor is no sinecure. It demands sound judgment, a steady head, and unremitting industry. He who holds the post is much in the public eye and continually under the fire of criticism from his political opponents. A governor is not only expected to do the work of three or four men, but he is counted upon to achieve results which, owing to the division of authority between himself and the legislature, are not always within his power to secure. He is blamed when things go wrong — when industry slackens and workers are out of employment, or when the price of living goes up, when taxes are high, or when there is a crime wave.

A HARD OFFICE TO FILL.

To be sure, there are governors who hardly justify the dignity which has been conferred upon them. They are the product of political machines and, in point of personal capacity, there is little to distinguish them from the most ordinary of their fellow citizens. The duties of the office weigh on them rather lightly, and they are more than willing to neglect tedious but essential executive chores for activities that accord them a fleeting and inconsequential popularity. More than one state capitol has sheltered for a term in its executive office some bizarre hillbilly whose qualifications for the proper performance of his job were a minus quantity. But if democracy sometimes produces this type of governor, it also produces real leaders, men of high personal and political integrity and of outstanding administrative ability. Such men often become the logical candidates for service on the wider plane of the nation. They may be called into the

WEAK AND STRONG GOVERNORS.

national cabinet or to the nation's highest court; or they may be elected to the Senate. Many have entered the lists for the presidency. Indeed, it is now almost a truism in politics that a strong governor in a "pivotal" state is presidential timber; and not a few have succeeded in attaining the nation's highest office. Rutherford B. Hayes and William McKinley of Ohio, Grover Cleveland, Theodore Roosevelt and Franklin Roosevelt of New York, Woodrow Wilson of New Jersey, and Calvin Coolidge of Massachusetts — seven Presidents out of the last fourteen — were governors of their respective states before going to the White House. Charles E. Hughes, Alfred E. Smith and Thomas E. Dewey of New York, James M. Cox of Ohio, and Alfred M. Landon of Kansas, also holders of the gubernatorial office, have during the same period received the nomination of their respective parties for the national presidency.

CHANGES IN THE POWERS AND PRESTIGE OF THE GOVERNOR DURING THE NINETEENTH CENTURY.

When one surveys the office of governor in its origin, its development, and its present status, there can be no question that it has greatly increased its powers during the past hundred years. In the early days of the Union, the post was one of dignity and honor. But the influence of the governor on legislation, his patronage in appointments, his financial functions, and his power as a party leader were all of them far less extensive at that time than they are today. Yet, paradoxically enough, although the governor's powers have greatly increased, there does not appear to have been a corresponding enhancement in the prestige of the governor's position. This may be due in part to our republican tradition which is disinclined to set men up on a pedestal merely because they happen to hold an important political office. Partly, too, it is due to our habit of ascribing steadily greater importance to various national offices and, hence, relatively less to state offices. Nowadays a governor willingly gives up his state post to become a United States senator; it was not so in the early days. But whatever prestige may or may not attach to the gubernatorial office, there is no doubt of its practical significance among our American political institutions. It is still a worthy goal for men of talent and ambition.

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CHAPTER XLII

STATE ADMINISTRATION

The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. — *John Stuart Mill.*

State administration represents the carrying out of policies determined by the legislature. At the first establishment of state government in America there were, in addition to the governor and the lieutenant governor, a small number of administrative officials, notably a secretary, a treasurer, and an attorney general. Sometimes these officials, with a few additional elective members, formed a governor's council, an institution which still survives in a few states of the Union. The secretary kept the official records, the treasurer served as custodian of the public funds, and the attorney general prosecuted suits in the name of the state. The functions of the other officers were equally few and simple.

THE ORIGINAL ADMINISTRATIVE OFFICERS.

But presently other officials were added to the list and chosen in the same way, an auditor or comptroller, a superintendent of education, a commissioner of labor, etc., each at the head of a new department. Then, with growth in population and the consequent increase in problems, still other administrative departments were established, sometimes headed by a single state official and sometimes by a board. This development, which has led to an extraordinary dispersion of administrative functions and to an uncoordinated and unplanned structure in state government, is largely the product of the last fifty years. In all the larger states these officials and boards have multiplied to formidable proportions, and in some of them the total number of separate administrative agencies has now reached sixty, eighty, even one hundred or more.

THEIR MULTIPLICATION IN RECENT YEARS.

The changing relation between government and business has been partly responsible for this elaboration of administrative machinery. The era of governmental noninterference in business enterprises has been rapidly drawing to a close. Banks and other financial institutions, insurance companies, railroad, express, telegraph, telephone, lighting, street railway, and other

REASONS FOR THIS DEVELOPMENT.

public service corporations, together with oil-producing concerns, hotels, lodging houses, and even barber shops, have been brought within the provisions of regulatory laws. To enforce these legal regulations, it has been necessary to establish boards and commissions of all sorts. Laws relating to the conditions and hours of labor, especially for women and children, laws relating to sanitation in industrial establishments, laws providing for workmen's compensation, for minimum wage scales in certain employments, for the adjustment of labor disputes, for old-age pensions — all this legislation has been crowding its way to a place upon the statute book during the past generation. These have also brought in their train a host of new administrative agencies, such as state bureaus of labor, industrial accident boards, minimum wage commissions, and the like. The public insistence on social welfare legislation, moreover, has put many new regulatory laws on the lawyers' shelves — and such laws almost always demand new machinery for their enforcement. A law relating to motion pictures, for example, becomes father to a censorship board; a law relating to fire prevention makes a job for a fire prevention commissioner. Some states have enacted laws to regulate boxing bouts and horse racing. Forthwith a boxing commission and a racing board are added to their administrative machinery.

WHY REGULATION INCREASES ADMINISTRATIVE MACHINERY.

All regulatory laws beget officials and boards. Such laws would be relatively futile unless they possessed this fecundity. For the boards serve a dual purpose. First, they see to it that the detailed provisions of the laws are carried into effect; they receive complaints and adjust them; they prosecute violations. Second, they provide the legislature, when it undertakes any new step in the way of regulation, with a source of information. It is absolutely impossible to incorporate in any law specific provisions for every case that may arise. Hence, the legislatures try to make the provisions broad, and then leave their individual application to men appointed for the purpose. In a word, our strict insistence upon a government of laws has given way under the pressure of problems which cannot be solved by a government of laws alone.

THE LURE OF THE PAY ROLL.

But there is another reason why the machinery of state administration has become so extensive, with its far-flung array of officials and boards, commissions and commissioners, bureau chiefs, directors, deputies, superintendents, inspectors, auditors, examiners, and all the rest. The reason is that each new agency provides some jobs, and every new job is a lifesaver for some politician's friend. There is nourishment in helping the process along, and none in fighting it. Laws, of themselves, usually provide no patronage for politicians to

distribute. But the administration of the laws may provide a great deal.

HOW IT OPERATES.

So public administration grows by what it feeds on. More administrative work calls for more administrators; then the additional administrators devise more work to do. A new administrative department usually begins in a small way — with a single official or a small unpaid board. A little eight-by-ten office in an unfrequented corner of the state capitol serves as the initial headquarters. But not for long. The fledgling board decides that it must justify its existence by finding work to do. And having found more work, it asks for more power, more money, more office room, a paid clerk, and a couple of stenographers. These presently expand into a large roomful of helpers, male and female, who are somehow kept busy each day from nine o'clock till five. A few more years and the office has spread over a whole wing of the capitol and its demands on the state budget run into many thousands of dollars. That is the story in a paragraph. With sundry variations it has been repeated in American state administration over and over again.

THE GENERAL ALLIANCE AGAINST DEFLATING IT.

Just try to halt this expansion and what will you find? At once the officials and employees of the department mobilize their political friends, and friends of their friends, to prevent any interference with the "invaluable" service the department or board is giving to the people. Other departments realize that their turn may come next, and hasten to the rescue. Delegations wait on the governor to plead, to warn, to threaten. Wires are pulled from all directions until every member of the legislature is importuned not to constrain the "absolutely indispensable" work which the department is doing. The only people interested in your proposal to keep the expansion within bounds are the taxpayers, and they won't take the trouble to attend legislative hearings. So the ballooning of administrative personnel keeps right on because the only people who could stop it are too busy to raise any unified protest. And today there is hardly a trade or profession which does not, in some of its operations, come under the hand of governmental administration and administrators.

ORGANIZATION OF THE STATE ADMINISTRATIVE DEPARTMENTS.

Some state departments are established in accordance with provisions of the state constitution, in which case the legislature has very little control over them, except that it can reduce their appropriations. Others are established by law and can be abolished at any time. Some are headed by a single director or commissioner while others are managed by a board — usually of three or five members. Whether the single or plural head

is to be preferred depends on the nature of the work to be done. If promptness, firmness, and vigor of action is needed, as in the office of the state auditor, the desirability of concentrating authority is self-evident; but if deliberation, continuity of policy, and the representation of varied interests is desired (as in the administration of the state university), then it is equally obvious that a board of regents will best serve to achieve these ends. Some heads of departments are elected by the people, while others are appointed by the governor, either with or without confirmation by the state senate.[1] Where skill and experience are required, it is difficult to obtain these qualities by the process of popular election. When a department head is elected by the people, moreover, the governor has no effective control over him. This is a weakness because the governor is held responsible for efficiency and harmony in all branches of state administration.

GENERAL FUNCTIONS OF THE DEPARTMENTS.

In general, the head of each department, be it a single director or a board, is responsible for the management of its affairs. All subordinate officials in the department are appointed by the department head, although in some cases the governor's approval is required; and, in states where civil service regulations have been established, they must be taken from the eligible lists. Dismissals and suspensions are also ordered by the head of the department, subject to the laws and regulations which govern such actions. Within their own fields of jurisdiction, the heads of departments authorize expenditures from appropriations which have been made to them by the state legislature and issue administrative orders or regulations in connection with their departmental activities. Such orders, if issued within the scope of their authority, have the force of law.

AGENCIES OF STATE ADMINISTRATION AND THEIR SERVICES

In most of the states the administrative units have now become so numerous that they defy any exact classification. But the greater portion of them can be grouped under about a dozen headings, based on the principal functions which they are expected to perform.

1. GENERAL STATE OFFICERS.

First, there are the various officials and boards which have to do with general administration — executive officials, they are more properly called. Among these are the secretary of state, the treasurer, the comptroller or auditor, the attorney general, the election board, and the civil service commission. The secretary of

[1] In a few eastern states a governor's council is the confirming body.

state not only keeps the official records but is entrusted with many other functions, such as the issuance of charters to municipalities and private corporations, the distribution of public documents, and the custody of the state seal. Normally, too, he is charged with certain duties relating to elections. The treasurer is the custodian of the state's funds. He also pays out all moneys; but every voucher or bill requiring the disbursement of money must be authorized by an appropriate administrative official in conformity with the law and must also be approved by the state auditor or comptroller. The treasurer is likewise charged with the issuance of bonds when the state borrows. The auditor or comptroller, to whom reference has just been made, audits the books of the state, checks its accounts, and keeps a watchful eye on the disbursement of funds. In authorizing the treasurer to make an expenditure of public funds, it is the auditor's duty to be sure that the legislature has already voted an appropriation to cover the intended expenditure. The attorney general is the chief prosecuting officer of the state, but he also acts as legal adviser to the governor, the legislature, and all other state officials. Prosecution of offenders against the laws of the state is usually handled by district or prosecuting attorneys elected by the voters of each county; but, in certain states, the attorney general has been given some supervision over the work of these local prosecutors. Election boards, where they exist, control the machinery of polling, but usually do this through local election officials. When there is a civil service commission or state personnel board, it supervises the administration of the laws relating to the merit system of appointments, holds competitive examinations, renders technical assistance in personnel matters to the state's political subdivisions, and tries to protect the public service against the evils of patronage.

THE SECRETARY OF STATE.

THE TREASURER, AUDITOR AND OTHER OFFICIALS.

A second group of state agencies includes those which handle sanitation and public health protection. Nearly every state has a department of public health with the duty of carrying out the laws relating to the collection of vital statistics, the prevention of disease, and the protection of the people against epidemics. Usually this department maintains some degree of supervision over the work of local health boards or officials. The laws and regulations relating to the public health have become numerous and complicated in the more populous states; they cover a host of matters, such as the registration of births and deaths, the reporting of contagious diseases, disinfection and quarantine, the disposal of sewage and garbage, the protection of water supplies, the inspection of food, especially of meats and milk, the abate-

2. PUBLIC HEALTH AND SANITATION.

ment of nuisances, and the amelioration of unsanitary conditions in restaurants, shops, and dwellings. The drift towards central supervision in public health administration has been strong during recent years. Individual communities are no longer left to make and apply their own regulations in this vital field.

Third, there are the boards which have to do with the regulation of public utilities. For a time, it was the policy of the states to let public service companies (such as street railway and electric lighting companies) go unregulated, except insofar as general provisions could be prescribed in their franchises. Administrative machinery for enforcing these general provisions was lacking. The result was that many large corporations, particularly those engaged in furnishing water, gas, electricity, telephone service, or transportation, abused their freedom from control and enriched themselves by overcharging the public. Then the states woke up and not only stiffened the general laws relating to public utilities but established boards to see that these laws were enforced. Within this category of supervising bodies, there are commissioners of corporations, water-power boards, railroad commissions, and public service commissions.

3. THE REGULATION OF PUBLIC UTILITIES.

In practically all the states, regulating bodies of this sort now exist. Their functions are so multifarious that anything akin to a complete summary would be impossible here. Some of these boards are endowed with large powers to hear complaints and adjust them, to make rules on their own initiative, to pass upon the reasonableness of rates and conditions of service, and to compel the submission of financial reports. Others have varying degrees of lesser authority, and some have powers of an investigating and advisory character only. Everywhere, however, the powers of such administrative officials and boards are expanding and becoming more effective. Their work constitutes a highly important phase of state government, but it is not always competently performed because appointments to regulating boards are sometimes treated as political patronage. Appointments to these important bodies have more than occasionally been given to "lame ducks," that is, to members of the state legislature who have rendered valuable service to their party but, having been defeated at the last election, have nowhere to go.

HOW IT IS DONE.

Fourth come the boards or commissioners for regulating banks, insurance companies, and loan corporations. These fields of corporate business have become subject to increasingly strict supervision in recent years. To compel sound financial methods, the various state legislatures

have passed elaborate laws, and to be sure that such laws are strictly enforced, most of them have established departments of banking and insurance. These departments have power to examine the books of all insurance companies, loan companies, and banks, which do business under state charters; to inspect their accounts, to make sure that their investments are in legal securities; to insist upon adequate reserves; and, in general, to require sound financial management. Many of the states also have a commissioner of corporations with functions in relation to corporate organizations other than banking and insurance companies.

4. THE REGULATION OF BANKING AND INSURANCE.

For a number of years the states have been extending their supervisory activities to the business of selling bonds and shares. The rules of supervision are embodied in so-called "blue-sky laws" and usually provide that no stocks or bonds may be offered for sale to the public until adequate information concerning the tangible assets behind them has been laid before the commissioner of corporations or some other state authority, and a permit obtained from him.[1] The issuing of this permit does not mean that the bonds or stock of a corporation are recommended to the people for investment or that the state vouches for the solvency of the companies concerned.

ENFORCEMENT OF "BLUE-SKY" LAWS.

The regulation of employment has also made a necessary addition to the state's administrative machinery. Until fairly recent years the amount of state control over ordinary industrial and mercantile establishments was relatively small. Factories and shops were considered to be outside the proper range of government regulation. But this policy of laissez faire has been rapidly passing into the discard, and today the state no longer concedes the right of manufacturers and merchants to do as they please in their own business — particularly as regards their relations with their employees. Hence, there has been a flood of laws dealing with sanitary conditions in industrial and mercantile establishments, the hours of work, workmen's compensation, minimum wages, unemployment insurance, child labor, safety appliances, the arbitration of labor disputes, unfair labor practices, fair employment practices, collective bargaining, the prohibition of "yellow dog" contracts, the use of the injunction in labor disputes, and a host of kindred subjects. In the past few years, moreover, there has been

5. THE REGULATION OF EMPLOYMENT.

[1] The term "blue-sky laws" originated in Kansas, where the first law of this sort was enacted in 1911. The implication was that many mining, gas, oil, and land companies were issuing bonds and shares upon assets no more tangible than the blue sky. The necessity for such laws in the states has been diminished, but not altogether eliminated, by the action of Congress in regulating the sale of securities (see p. 415).

a distinct trend towards the legal regulation of the workers' own organizations, a half-dozen midwestern and southern states having passed laws requiring labor unions to file financial and membership statements with the public authorities and to refrain from certain kinds of organized action against employers.

These laws have required, for their administration and enforcement, an additional quota of officials, boards, and commissions. Conspicuous among them are commissioners of labor, or labor boards, whose duty it is to investigate industrial conditions, to enforce the laws relating to employment, to see that factories are regularly inspected as to their sanitary arrangements and their proper equipment with safety devices, to eliminate the evils of sweatshop production, and in many cases to mediate in disputes between employers and employees. In a few states this last-named function is entrusted to a special state board of arbitration or conciliation. Provision for the compulsory arbitration of labor controversies does not yet exist in any of the states.[1]

WORKMEN'S COMPENSATION LAWS AND THEIR ADMINISTRATION.

The passing of workmen's compensation laws in nearly all the states, moreover, has necessitated the establishment of special boards for the detailed administration of these statutes. They are called industrial accident commissions or workmen's compensation boards. Under the common law the workman secured redress for injuries only when the accident was due to the fault or negligence of his employer. The law gave no redress when the injury could be shown to be due to his own negligence or to the negligence of a fellow workman. And even when the workman was entitled to be compensated, he could obtain his redress (prior to the passing of the compensation laws) only by bringing suit in the regular courts, and this was always an expensive procedure. The basic principle of workmen's compensation laws is that when an employee sustains an injury in the course of his work, whether through the fault of others or through his own fault, the resulting burden should not be placed wholly upon himself, or upon his family, or even upon the employer, but should be included in the cost of production and thus borne by the entire consuming public.

Employers are therefore being compelled to insure their workmen

[1] In 1920 the legislature of Kansas passed a law establishing in that state a court of industrial relations, its judges appointed by the governor, with power to settle all industrial disputes of whatever sort in "essential" industries, that is, in industries affecting food, clothing, fuel, and transportation. The decisions of the court were made binding upon both employers and workers. But this experiment was partially wrecked by the action of the United States Supreme Court in declaring certain provisions of the Kansas act to be in conflict with the fourteenth amendment. See Wolff Packing Co. *v.* Court of Industrial Relations, 262 U. S. 525 (1923).

against the industrial accidents which inevitably occur in most occupations and against other occupational hazards, such as disease contracted because of the employment. The employers are expected to set down the cost of this insurance as one of their regular items of expense, like taxes, or fire insurance, or the replacement of machinery. When machines break down, the employer repairs the damage and charges the cost to the consumer of his product. But men break down as well as machines. It is the intent of the workmen's compensation laws that this damage shall be taken care of in the same way. The boards or commissions set up to administer these compensation laws decide upon the amount of compensation to be paid in each case where liability exists, and how it shall be paid. Only one state (Mississippi) at present has no workmen's compensation law. Some of the states still permit an employer a choice between having his liability to an injured employee determined under the compensation act or having it assessed in court. Others compel the employer to accept liability under the terms of the compensation act. Approximately half of the states with compensation laws require that the employer insure himself against potential claims of employees. Such insurance may usually be placed with a special state insurance fund or with private insurance companies, but several states require that it be placed with the special state insurance fund.

MINIMUM WAGE LAWS.

Minimum wage laws affecting women and minors have been enacted in many of the states. Occasionally the minimum wage, at least for stipulated pursuits, is set down in the statute itself; normally, however, a wage board is established to investigate living conditions and the rates of wages paid to women and minors in industrial and mercantile establishments; the board then determines the minimum wage to be paid in each form of business. It may set up a different rate for different localities, for example, a higher minimum in large cities than in small towns. Until a recent decision of the United States Supreme Court,[1] the power of a board to compel the employer to pay a minimum wage thus established was in doubt, and the determination of the wage board depended largely on public opinion for its enforcement. Now, however, there is no longer any question but that the employer can be legally required to pay the wage established, and most minimum wage laws are now of the compulsory type. Justification for this policy of compulsion is not unlike that for workmen's compensation laws. It is argued that society as a whole cannot safely permit large bodies of women and children to be employed at rates which are below the normal standard of living; for if such conditions are tolerated,

[1] West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 (1937).

the ultimate cost in crime, poverty, disease, and immorality will fall upon the whole community. It is better, therefore, that the consumer should pay higher prices for goods than that he should pay less for what he buys and then make up the difference (or more than the difference) in taxes for the support of jails, reformatories, poorhouses, and other institutions which draw so many of their recruits from the derelicts of industry.

6. SOCIAL AND INDUSTRIAL SECURITY.

Under the terms of the Social Security Act which passed Congress in 1935, provision was made to assist the states in establishing various forms of social security in addition to the old-age insurance scheme which is maintained and administered directly by the national government.[1] This assistance covers state programs for the support of the aged poor, the blind, and orphaned children, as well as a state system of insurance for able-bodied workers out of employment. In general, the national government makes grants to the states covering one half of the benefits as well as the entire costs of administering the plan. Although several states had already provided limited financial assistance to the needy aged, the blind, and to children deprived of parental support, the federal government's offer of grants-in-aid made such programs virtually nation-wide and in some cases resulted in raising the scale of benefits paid to the individuals. More than half a billion dollars is now being annually expended for this assistance to the aged, while sizable sums are likewise being spent to aid the blind and to support needy children.

ASSISTANCE TO THE AGED AND OTHERS.

The state unemployment insurance programs have also developed remarkably in recent years under the aegis of the national Social Security Act. Relevant provisions of this act, discussed earlier, bear repetition here. A federal pay roll tax is imposed upon all employers in defined categories for the support of unemployment insurance, but employers are allowed to credit similar taxes paid to a state unemployment insurance fund against this federal tax up to a maximum of 90 per cent. The national government also pays most of the administrative expenses of a state unemployment program. Under the stimulus of this national generosity, most of the states have now set up unemployment insurance plans. These vary in details from state to state, but they are all similar in essentials. In general, they provide for compensation from a state insurance fund to those who are "involuntarily unemployed." The compensation amounts to a certain percentage of normal weekly earnings, usually

UNEMPLOYMENT INSURANCE.

[1] See pp. 454 *ff.*

about 50 per cent, but these payments are limited to a maximum of about sixteen weeks in any year. Proceeds accumulated from the state's pay roll taxes are invested in an unemployment trust fund established by the federal government; the total in that fund is now around the three-billion-dollar mark. Although domestic servants, agricultural laborers, persons employed by charitable institutions, and certain other types of workers are not included in the plan, there are now nearly forty million workers covered by these state unemployment insurance plans.

THE EXPANSION OF ADMINISTRATIVE AGENCIES IN THIS FIELD.

Needless to say, the national Social Security Act and the various state welfare programs have required a good deal of new administrative apparatus. Each state now has special agencies concerned with unemployment compensation, old-age assistance, aid to the blind, and other forms of public aid and assistance. Sometimes these have been set up as separate state departments, commissions, or boards. Sometimes, on the other hand, they have been incorporated as special bureaus or divisions in existing agencies of state administration, such as the labor, health, or welfare departments. It is worth noting that wherever such administrative units have been set up, the Social Security Act requires the states to staff them with personnel recruited under the merit system. This has stimulated the extension of civil service in states where there had been relatively little of it prior to the national government's action.

7. CHARITIES AND CORRECTIONS.

Then there is the problem of those needy persons who do not qualify as recipients of aid under any of the programs just described. Direct relief for such persons, except in time of emergency, is generally regarded as the responsibility of the counties, cities, towns, and villages in which they live. But there is usually a state board of charities or public welfare, or whatever it may be called, which supervises and coordinates the work of the local relief agencies. During the depression of the 1930's the states acted as agents of the national government in handling work-relief projects and in distributing direct relief to persons for whom public work could not be provided. In addition to the state board of charities or public welfare, there is also a department of public institutions which has charge of establishments maintained by the state for the care of the insane as well as for the instruction of the feebleminded, the deaf and dumb, or those otherwise handicapped. The general supervision of state prisons and reformatories is also a function which usually requires a department of its own.

Public property also calls for administration. Each state possesses valuable assets in land and buildings; some of them also have harbors,

docks, forests, mines, oil wells, and other properties. Various state departments are given supervisory functions in relation to these properties, but there is the greatest variation in the names and duties of the commissioners or other officials who do the work. Throughout the greater part of the nineteenth century, the natural resources of the country seemed inexhaustible and they were exploited, almost without hindrance, for the profit of private individuals. Eventually, however, the country awoke to the realization of the possible shortage in timber, coal, oil, and other non-replaceable products of the earth. Public opinion called for a program of conservation under government auspices. Conservation, however, does not merely mean avoidance of wastage; it involves restoration also, where restoration is possible, as in the case of reforesting, the replenishment of exhausted soil, the reclamation of swamp lands, and the control of flood waters. In the case of mines and oil wells, the problem is one of making the natural resources go farther by improved methods of extraction from the earth. Conservation, in its broader sense, likewise involves the improvement of harbors and waterways, so that they can more completely fulfill their purposes. Perhaps the greatest of all opportunities for conservation lie in the steady improvement of agricultural methods, thus making two blades of grass grow where one grew before. As a result of all these activities, the states have developed their commissioners of conservation and reclamation, harbor boards, boards of forestry and flood control, boards of agriculture, and a score of similar administrative agencies.

8. PUBLIC PROPERTY AND NATURAL RESOURCES.

The advent of the automobile created a nation-wide demand for hard-surfaced wider highways with the elimination of dangerous curves. In all the states there has been great activity in the endeavor to meet this demand. The national government has also done its part and, since 1916, has made generous grants to the states for the construction of main highways. But the states themselves have financed an even larger part of the work by allocating to it the revenue from motor-vehicle and gasoline taxes. Although various federal specifications and standards must be complied with, the actual responsibility for building the highways and keeping them in repair has normally been entrusted to the state highway departments. These agencies often use the services of private contractors in the work of road construction and repair; but an increasing amount of the construction and much of the maintenance is now undertaken by the state highway departments directly.

9. HIGHWAYS.

The department of education is almost everywhere one of the most

important among agencies of state administration. It was not always so. In earlier days, education was left almost wholly to the cities, towns, and rural areas, to be regulated by local school boards according to their own ideas of educational efficiency. Even yet the local school board is in immediate control and in many cases its discretion is still unrestricted; but steadily in all parts of the country the state is taking over a supervising jurisdiction. Every state today has a department of education or of public instruction under an executive head, commonly called the superintendent of education or instruction. Many of them have state boards of education as well, and some have special authorities for the supervision of the state university or for the other public institutions of higher education — boards of regents, they are usually called.

10. THE SUPERVISION OF PUBLIC EDUCATION.

The functions of a department of education vary with the degree of centralized control which the state authorities have assumed. In no two states are they alike. In some states the department outlines the program of school studies, chooses the textbooks, apportions state funds to local schools, prescribes the qualifications of teachers, appoints school superintendents, and settles nearly all the details of educational policy; in some, it has more limited powers; and in others, again, its functions are little more than advisory. On the whole, however, the tide has turned towards centralization, towards giving the state departments of education more power and leaving less discretion to the local school boards. This is defended on the ground that central control is necessary for the maintenance of proper educational standards.

The laws relating to the assessment of property for taxation and to the methods of taxing this property have become so involved and technical that new administrative agencies for interpreting and applying their provisions have had to be created. State boards of assessment or of equalization, state tax commissioners, and various allied authorities, now figure upon the list of departments in many of the states. There was a time when virtually complete dependence for public revenue was placed upon property taxes. Such taxes were easy to assess and, when imposed, could not be evaded. But with the increase of "intangible" property in its varied forms — mortgages, stocks, bonds, franchise values, bank deposits, notes, and bills payable — the task of making this form of wealth contribute its just share of the public revenue presents a much more difficult problem. Intangible property, when left to be assessed and taxed by the local authorities, often escapes taxation altogether. Taxes on the profits of corporations, on franchise values, and on inheritances, also present practical difficulties

11. ASSESSMENT AND TAXATION.

in the way of local assessment. A gas company, for example, may operate in a dozen municipalities and no fair valuation of its property can be made by figuring it piecemeal. So the states, in some instances, have taken the assessment of these taxes into their own hands. Usually, however, a portion of the proceeds is turned back to the local authorities. State tax boards or commissioners now exist in most of the states, with constantly increasing powers for the assessment of property and for the collection of corporation, business, inheritance and income taxes, gasoline taxes, and a variety of other revenues.

12. REGULATION OF THE PROFESSIONS.

In nearly all the states there are various boards whose business is to issue certificates for the practice of different professions or trades. There are examiners for admission to the practice of law, boards of medical and dental examiners, boards of examiners in pharmacy, boards for the licensing of stationary engineers, plumbers, pilots, real estate brokers, insurance agents, nurses, hairdressers, cosmeticians, etc. The list is steadily expanding. At the present rate of expansion, it will not be long before some sort of state license is required for every type of mental or manual activity. The general rules concerning eligibility for license to practice these various professions and trades are made by the legislature; but the boards conduct the examinations and grant the certificates. They have also, in most cases, authority to hear charges made against any licensed practitioner and to suspend or revoke certificates. The expense of maintaining these licensing boards is usually defrayed by the fees which applicants are required to pay.

13. SUPERVISION OF MILITARY AFFAIRS.

All the original state constitutions paid particular attention to the organization and control of the militia. It was taken for granted that the military forces of each state would be largely within its own jurisdiction, even though the federal Constitution gave to the national government certain authority in time of peace and complete powers in time of war. The national laws (especially the Army Organization Act) have greatly reduced the freedom which the several states formerly possessed with reference to their national guard establishments;[1] nevertheless, all the states continue to maintain departments of military affairs. These are customarily headed by an officer known as the adjutant general. He is the right-hand man of the governor, who is usually the titular commander in chief.

In addition to all the foregoing, there are various miscellaneous boards which look after the innumerable odds and ends of state administration. Each state has its quota of them. Some have state police departments,

[1] See p. 492.

for example; some have boards which license chiropractors, or grant permits to race-tracks, or supervise boxing bouts and wrestling matches.

14. MISCELLANEOUS.

In addition, one finds various *ad hoc* bodies, that is, boards created to exercise functions of a temporary nature such as the building of a state capitol, or the consolidation of the state laws, or the taking of a census. Such bodies go out of existence when their work is finished. Permanent or temporary, the number of state administrative agencies is larger than the average taxpayer ever realizes. In the more populous states there are a hundred or more of them, each whirling around in its own orbit. Each has its own sphere of duty and is independent of the others. There is usually no coordination except such as the governor may be able to apply.

SOME CHARACTERISTICS AND PROBLEMS OF STATE ADMINISTRATION

OUTSTANDING FEATURES.

This somewhat detailed description of state administrative agencies and services has been undertaken in order to emphasize two things: first, the amazing scope and variety of the state's responsibilities, and second, the chaotic mechanism with which the states are trying to have these functions performed. Even more extensively than the multifarious agencies of the government at Washington, these innumerable state boards and officials regulate, supervise, and circumscribe the daily life of the American citizen. Their personnel forms a great host which no man can number, and it is increasing every year. Taking the entire forty-eight commonwealths, there are now nearly a half million people who give their entire time to the various branches of state administration and draw pay for doing it. The exact figure cannot be given, for if you started counting them today, your total would be wrong the day after tomorrow. The roster of administrative officials employed by the national government is much larger; but there is this very important difference between the two: in the national government, every administrative officer, from highest to lowest (save in a very few cases), is responsible to the President. He can give directives to them, and can remove them from office if they do not work together as he directs. But in state government, there is no such integrated responsibility to the chief executive. Most state officials cannot be ordered by the governor to do this or that. They cannot be removed by him. Some of them are elected by the people directly and hence have no responsibility either to the governor or to the legislature. Others are appointed under state laws which give them freedom of action and security of tenure. If you make a blueprint of national administration, you will

find that you must draw hundreds of lines, but they virtually all run upward and inward. They converge in the White House. But make a blueprint of the administrative setup in any one of the states, and you will get a layout that no one can describe and few can understand.

It is essential that this top-heaviness, disintegration, clumsiness, and lack of concentrated responsibility in state administrative machinery be impressed upon every student of American government. At the present rate of increase, some of the states will soon have more boards than there are members in the legislature. This tangled web of administrative organization, wholly unplanned in development, represents an endeavor to cope with the new and urgent problems which growth in population and in the complexity of life have thrown upon the public authorities. The situation has been accentuated by the recurring emergencies of the past thirty years. But it embodies an arrangement which cannot be prolonged and expanded indefinitely. The maze of jurisdictions will eventually break down of its own sheer weight. Some of the states have been aroused to an appreciation of this fact and have busied themselves with programs of administrative simplification. They have been trying to reduce the number of state departments and endeavoring to centralize responsibility. But this is another story and should be reserved for a later chapter.[1]

REACTION AGAINST THE INCREASE OF STATE BOARDS.

The shortcomings of state administration, as one may observe them at the present day, are not wholly due to the multiplication of departments or to the lack of cooperation among them. Something is attributable to the difficulty which the departments encounter in obtaining capable helpers. Positions on the pay roll of the state are everywhere eagerly sought, to be sure, but this is because the remuneration is better, the discipline less strict, the hours of work fewer per day, and the holidays more frequent than in private employment for service of the same quality. Unhappily those who seek the positions, and obtain them, are not for the most part persons who would make a conspicuous success in private vocations. Go into the various offices at the state capitol, or indeed in any state building, and note the nonchalant way in which most of the work is being done. Go to the counter and see how long you wait to be served. Note also the enthusiasm with which the exodus of employees takes place when (or even a few minutes before) the clock strikes five. And why not? Most of these men and women are not really interested in their daily routine. The service of the state in America

A PRACTICAL DIFFICULTY IN THE WAY OF EFFICIENT STATE ADMINISTRATION.

[1] See Chapter XLV.

has not yet managed to afford real careers for young men and women of ability as it does in other countries.

THE HANDICAP OF INFERIOR SERVICE.

The lack of a comprehensive and genuine merit system, covering not only appointments but promotions, is chiefly to blame for this. We chide the employees of the government for not showing more ambition and alacrity; but the fault is by no means entirely theirs. Our system of appointing and promoting them is where most of the blame belongs. The worker in a private establishment exerts himself because he knows that his advancement depends upon it. But those who work in the office of the tax commissioner, or the registry of motor vehicles, or the bureau of audits, or in any other state office, are well aware that personal ability and hard work afford no certain guarantee of promotion when the time comes. Some friend of an influential politician may go over the heads of those who have served long and faithfully. It should not be so. And when it ceases to be so, there will be far more interest and energy shown by public employees in their work.

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CHAPTER XLIII

STATE FINANCE

Finance is not mere arithmetic: finance is a great policy. Without sound finance no sound government is possible; without sound government no sound finance is possible. — *Woodrow Wilson.*

THE SCOPE OF PUBLIC FINANCE.

Representative government owes its origin to financial necessities. Mediaeval kings summoned the people to parliaments because they needed money. And public finance is still the chief problem of legislatures. Originally it was a relatively simple one because the states did not need much money, and they got most of it easily enough. Their expenditures were of very modest proportions. Many of them had no indebtedness at all. But the days of simplicity and thrift have now gone by. The states have been enlarging their activities; they do far more for the citizen than they did half a century ago. Doing more, they have had to spend more. Spending more, they have needed more revenue. Needing more revenue, they have had to devise new forms of taxation, some of them exceedingly complicated. Elaborate systems of budget-making and budgetary control have had to be worked out as a means of keeping expenditures within bounds. And notwithstanding this control, many of the states have piled up considerable indebtedness.

SOURCES OF STATE REVENUE.

From what sources do the states obtain their revenue? A certain amount of financial assistance comes from the national government by way of grants-in-aid for highways, public works, social security, education, and other special purposes.[1] Indeed, more than half a billion dollars annually have come from this source in recent years. Some states obtain income from public lands, chiefly mineral and oil-bearing lands which they own, and from the profits of a state enterprise, such as a publicly operated alcoholic beverage dispensary or from state-owned docks, canals, and toll bridges. A considerable amount comes each year from fees, licenses, fines, and forfeitures, from interest on state funds deposited in banks, and from the

[1] On the system of federal grants-in-aid, see pp. 483–485.

sale of surplus state property. But taking the states as a whole, the bulk of their revenue, at least 80 per cent, is derived from taxation.

THE GENERAL PROPERTY TAX.

Until fairly recent years, the principal source of tax revenue was the "general property tax." This is a direct tax levied upon the assessed value of real property, which includes lands and buildings, and upon personal property such as merchandise, bonds, stocks, and mortgages. But certain types of excise taxes, at present levied by many states, and the imposition of taxes on both individual and corporate incomes have greatly reduced the significance of the property tax. In the past few years, indeed, the yield from direct taxes on property has accounted for less than ten per cent of the over-all revenue of the forty-eight commonwealths for general governmental purposes. Nevertheless, the property tax is still a very important fiscal imposition because it is used to satisfy the revenue needs of the counties, cities, towns, and other local subdivisions within the state.

REQUIREMENTS FOR UNIFORMITY IN PROPERTY TAXATION.

As used in the earlier part of the nineteenth century, the general property tax was levied upon all forms of property at a uniform rate. Uniformity was in fact required by many of the state constitutions. This requirement of uniformity was part and parcel of a political philosophy which insisted upon the strict equality of all men before the law. The natural equality of men was extended to their property. Land and buildings, like natural-born citizens, were deemed to have been created free and equal. Hence they should be made to share equally in the burdens of government. In these earlier days, moreover, property consisted for the most part of tangible things: lands, buildings, merchandise, and slaves. What we now call "intangible" property, such as mortgages, bonds, and stocks, did not then form a large factor in the total wealth of the community.

ELIMINATION OF THESE REQUIREMENTS.

But all this has now been changed. The growth of intangible property during the past half century has been enormous; today it forms the major portion of our entire national wealth. Its distribution among the people has become so unequal, moreover, that the policy of taxing all kinds of property at a uniform rate is no longer justified. Tangible property, such as land, buildings, and stocks in trade are in plain view for the assessor to see; but stocks and bonds are stowed away in safe-deposit boxes, out of his sight. Uniformity of tax rates, under such conditions, is likely to mean that taxes are not levied in accordance with ability to pay but in accordance with inability to evade. It is now generally believed that a fairer distribution of public burdens can be made by classifying property into various forms and

letting the legislature impose a different rate upon each. The temptation to evade the tax on intangibles is lessened by lowering the rate on such property.

SEPARATION OF TANGIBLE AND INTANGIBLE PROPERTY.

It is mainly for this practical reason that one state after another has adopted, in recent years, the practice of separating tangible from intangible property and levying a much lower rate upon the latter. This lower rate is either placed directly upon the value of the intangible property itself, or it is levied upon the income derived from such property, thereby taking the form of an income tax. In either case, there is usually a legal requirement that every owner, trustee, or recipient of income (with certain exceptions) must file a sworn declaration as the basis of a true assessment. Only in some such way has it been practicable to make wealth in the form of securities pay its due contribution to the public revenues. In a word, the unmodified general property tax, under prevailing economic conditions, is unsound in theory and unequal in practice. It treats all kinds of property alike even though there are vast differences in the various forms of modern property. It leads to tax dodging on a large scale and tempts even honest men to evasion — for if they paid the general property tax rate on their stocks and bonds, they would often be giving up more than half the income from these investments.

THE ASSESSMENT PROCESS.

Certain procedures are normally observed in levying property taxes. One of these is the making of an assessment. In nearly all the states the assessing of property is carried out by city and county assessors. The same lists are then used as the basis of state, county, and municipal taxes. All tangible property is supposed to be assessed at its fair market value or at some specified percentage of this value. The assessments are revised from time to time, sometimes every year; but for purposes of state and county taxation, not usually more often than once in every three or five years. Throughout the country the work of assessing is rather indifferently performed because the assessors are usually elective officials with no special training for the function of estimating property values correctly.

REVIEW AND EQUALIZATION.

When the assessors have finished their task, each owner is notified of his assessment. An opportunity is given him to appeal if he thinks the assessment is too high. Such appeals are heard in the first instance by a local board of revision or review. A further appeal to some higher authority is often permitted. Since there are different assessors for each city, township, or county, the assessments often disclose great inequalities; hence a state tax com-

mission, or state board of equalization, or some equivalent authority, goes over the lists and does what it can to equalize them. This is important because, as previously indicated, the local assessment lists are used for the imposition of state as well as local property taxes; and unless an attempt is made to equalize assessments, the taxpayers of some counties would be required to pay a disproportionate share of the state taxes. Besides acting as an equalization board, the state tax commission also has the duty of directly assessing the properties of railroads, telegraph and telephone companies, and other public utilities, because such properties are distributed in various localities and are consequently difficult to assess locally. Moreover, these enterprises often operate in two or more states, and the question of just what proportion of their property a particular state may assess for taxation is best left to a central authority. Taxes on locally assessed property are usually collected by locally appointed or elected tax collectors, and the state's share is then paid to the state authorities. Taxes on property assessed by state agencies are collected by the state tax collectors and the localities subsequently receive the shares due them, if any.

ASSESSMENT OF SOME PROPERTY BY STATE AUTHORITIES.

As already indicated, the direct property tax has, in recent years, surrendered its primary position as a source of general state revenue, and other forms of taxation have taken its place. Currently, one of the most important sources of general revenue in many of the states is the retail sales tax. Although this tax assumes various forms and sometimes exempts the necessaries of life (particularly food, clothing, and shelter), its normal form is a levy of from one to three per cent on all retail sales. The retail sales tax is sometimes criticized as being "regressive," that is, as being proportionally more burdensome on the poor than on the well to do. A sales tax of three cents a gallon on gasoline falls with equal burden whether a car is being driven to work or on pleasure. There are those who contend that this equality does not represent social justice, whatever that term may mean. Yet, as a practical matter, it would be very difficult to levy different rates in accordance with the use made of commodities, whether essential or nonessential, whether by the poor or by the rich.

OTHER FORMS OF TAXATION: SALES TAXES.

Another indictment sometimes lodged against the sales tax is its alleged deflationary effect on business. It adds to the price of goods and hence, to a certain extent, may discourage buying. This objection gains weight when business is slackening and efforts are being made by governmental action to stimulate it. On the other hand, the sales tax is very productive, easy and inexpensive to collect, all-inclusive in its range, and reaches

millions of people who otherwise would contribute little or nothing to the public revenues. At any rate, the imperative need for more revenue during the depression period of the 1930's caused many of the states to impose sales taxes, despite the objections which have been mentioned, and there is no immediate likelihood that they will soon abandon this type of taxation. The proceeds of sales taxes go for the most part into the general state revenues; but in many states an exception is made in the case of sales taxes on motor fuel. The revenue from the sales tax on gasoline is frequently set aside for the construction and maintenance of state highways, although in recent years the tendency has been to divert at least a portion of this revenue into the general fund.

Two other taxes which now contribute largely to the general revenues of the states are those imposed upon incomes and inheritances. More than half the states now levy income taxes, and all but one of them collect taxes on estates or inheritances.[1] In most instances, income taxes are levied upon both individuals and corporations, although a few states limit them to corporations and a few others to individual incomes. When levied upon a corporation, they are sometimes regarded as a substitute for a tax upon the corporation's property. State income taxes are progressive in nature (i.e., the higher the income the higher the *rate* of taxation), although rates are not graduated so steeply as in the case of the federal income tax.

INCOME AND INHERITANCE LEVIES.

The inheritance tax, as its name implies, is a tax upon inherited property. Its rates are also graduated, and smaller inheritances are sometimes exempted from taxation altogether. Occasionally, too, the rate varies according to the degree of the relationship of the heir, being higher for distant relatives of the decedent and lower for closer relatives. One objection to the inheritance tax, at least from the point of view of the budget-making authority, arises from the fact that its proceeds cannot be forecast in advance. It may be twice as productive one year as compared with the next, depending upon how many rich residents happen to die. One factor responsible for the widespread imposition of state inheritance taxes is a provision in the federal tax law of 1926 which stipulates that inheritance taxes paid to a state government may be credited against inheritance tax payments to the federal government up to 80 per cent of the total of the federal tax. This measure caused a number of states, previously without an inheritance tax law, to adopt one.

A considerable variety of additional imposts may be found in one state or another. Instead of being taxed on their net income, corporations

[1] An estate tax is levied on the property which a decedent leaves. An inheritance tax is levied on the property which an heir receives.

are sometimes required to pay a tax on their capital. In addition, they may be taxed for the privilege of existing as a corporation or for doing business under the corporate form. Several states, particularly in the South, have various forms of business or occupation taxes which provide considerable revenue. Others tax the recording of mortgages and the transfer of shares in corporations. A few have poll taxes. Likewise, in various states there are special excises, as for example on chain stores, and on electric current, on the operation of race tracks and betting, and on admissions to certain places of amusement. Various states derive revenue from the so-called "severance" taxes. These are taxes on the utilization of natural resources, especially on coal, oil, ore, and timber, whenever these are "severed" from the earth. A large amount of revenue now comes from the special pay roll taxes which are levied in every state to support unemployment insurance schemes. But the proceeds of this tax are devoted exclusively to the purpose for which it is levied and hence they contribute nothing to the general support of the state's government.

MISCELLANEOUS IMPOSTS:

1. CORPORATION AND OTHER TAXES.

2. SPECIAL EXCISES.

3. SEVERANCE TAXES.

4. UNEMPLOYMENT INSURANCE TAX.

Questions of jurisdiction sometimes arise out of the application of the state's tax laws because the owner of the taxable property or the heir to an estate may be a resident in some other state. It is a rule that real estate and tangible property such as automobiles, farm implements, and merchandise, are taxable wherever they are situated, even though owned by nonresidents. Stocks, bonds, and other intangible property may be taxed where the owner resides or where the securities are kept. The usual plan, in accordance with the principle *mobilia sequuntur personam*, is to tax such intangibles in the state where the owner has his domicile or legal residence. The same is true of income taxes when levied by the state. Inheritances may be taxed at the domicile of the deceased owner or where the inherited property is situated. Not infrequently the same inheritance is taxed in both states. But by reciprocal legislation, most states have now exempted securities owned by residents of other states from the provisions of their inheritance tax laws. Sales taxes are collected where the sale takes place, but some states are endeavoring to obtain the equivalent of this tax from their own residents when purchases are made by them outside the state. This is done by means of what is known as the "use tax," that is, a tax upon the privilege of using, within the state, goods which have been purchased outside the state. It is levied at the same rate as the sales tax. Although this practice embodies an interference with interstate

SOME JURISDICTIONAL ISSUES.

commerce, which is wholly within the jurisdiction of the federal government, the courts have thus far shown no disposition to interfere with it so long as the use tax is not levied at a higher rate than the sales tax.

TAX EXEMPTIONS.

There are certain forms of property which the states may not tax under any circumstances. Property owned by the federal government is one of them — for example, army posts, navy yards, air fields, government hospitals, as well as post offices, national forests, and federal power plants such as those at Boulder Dam and in the Tennessee Valley. For more than a hundred years, the same exemption applied to the salaries of federal officers and employees; but that exemption has now been removed by federal law, and the state may tax the income paid by the national government to its officers and employees if they reside within the state's boundaries.[1]

Goods passing across a state during their importation from foreign countries, or carried in interstate commerce, are also immune from state taxation. Incomes derived by individuals from savings bonds and other obligations of the national government are likewise outside the state's power to tax. As a rule, moreover, the states do not tax their own property (such as the state capitol or the penitentiary), for that would be only robbing Peter to pay Paul. Nor do they tax the property of their own cities, towns, townships, or counties, and in many states they do not levy taxes upon the real estate owned by colleges, churches, and similar educational or religious institutions. These exemptions, however, do not usually apply to special assessments or local improvement taxes which are imposed upon nearby property to pay for a street widening or some such betterment. These are not regarded as taxes in an ordinary sense and are not subject to the general rules relating to taxation.

JUDGING THE MERITS OF A TAX.

Almost any tax, taken by itself, can be shown to be unfair and oppressive. If all the revenues of the state were derived from income taxes, sales taxes, property taxes, or inheritance taxes, we would have a thoroughly inequitable situation. Yet any one of these taxes can be defended as *part of a general tax system*. The purpose of a general tax system should be to raise sufficient public revenue by requiring contributions from everyone according to his capacity to pay, so far as this capacity can be estimated. No single form of tax achieves this end. Every tax, whatsoever its nature, falls too heavily on some and lets others off too lightly. The only solution of this difficulty is to impose a variety of taxes, so that some of them may cancel out the inequalities of the others, and in the end everyone may find him-

[1] This is a reciprocal arrangement: the federal government, in turn, is permitted to tax the income of state officers and employees.

self bearing a reasonable share of the common burden. In other words, what we ought to consider is not the justice or injustice of any one tax, taken by itself, but the operations and results of the tax system as a whole. That, unfortunately, is not what the makers of our tax laws usually do. They consider each tax separately, and too often with reference to its political implications.

THE DUPLICATION OF TAXES.

Everyone is agreed on the principle that people ought to be taxed according to their ability to pay. But what is a man's ability to pay a certain tax? It depends on what other taxes are levied upon him, does it not? And nobody seems to be keeping track of that. Taxes on the sale of gasoline are being laid by the federal and state authorities. Sometimes the county has a gasoline tax also. Inheritances and incomes are being taxed by two or more taxing authorities, each with very little heed to what the others are doing. The result is a cumulative burden of taxes which in their totality may become unjust and oppressive on one class of people. There are too many taxing authorities in the United States and too little team-play among them.

AN EXAMPLE.

Suppose a man owns a ten thousand dollar house, with a five thousand dollar mortagage on it, and that he rents this house to a tenant. There is only ten thousand dollars (not fifteen thousand dollars) worth of property here. A tax of twenty or thirty dollars per thousand on this property valuation might be considered fair enough. But when, in addition to this, you tax the income which the owner receives from his property in rent, also the face value of the mortgage, and the interest which the mortgagee receives as income — when you do all this, you may be making the same parcel of property yield a good deal more than its proper share.

THE SHIFTING OF TAXES.

It has already been pointed out, but it will bear repetition, that taxes do not usually stay where they are placed. Everyone on whom a tax is laid will shift it to someone else if he can, and in many cases he manages to do it. The owner of a store building includes the taxes in the rent which the merchant pays; the latter passes it to his customers and they will shift it (if they can) to their employers. Rents, prices, and wages respond, sooner or later, to increased taxes. The ultimate consumer raises a hue and cry about the sales tax, for he pays it directly and his pocket nerve feels the twinge at every purchase; but he does not realize that the price tag has already absorbed some other taxes before the sales tax gets added to it.

When taxes on real estate remain unpaid for a certain period, the custom is to add a penalty. Then, after the lapse of a further period, the

property may be sold for taxes, either by the municipality or the state as the case may be. During the economic depression which began in 1930, large amounts of taxes were left unpaid and a great deal of property became liable to sale. As an emergency measure, many of the states tried to give relief by reducing the interest rate on overdue taxes by permitting the payment of such taxes in installments over a term of years, or by writing down the delinquent amounts, and in some cases by providing a moratorium on tax sales. In many instances this policy did not avail to save properties from ultimate forfeiture; on the other hand, it increased governmental deficits and threw an added burden on those who, sometimes at great personal sacrifice, managed to pay their taxes on time.

TAX MORATORIA.

A further outcome of the rise in tax delinquencies was a movement for placing a rigid limit on tax rates. In several states, largely through the joint efforts of farmers and real estate interests, flat limits have been placed upon the rate of taxation which may be levied on real property. Realizing the need for some leeway in emergencies, however, it is sometimes provided that the limit may be exceeded by a two-thirds vote of the people in the taxing area or by the permission of some designated county or state authority. Such rigid tax limits do not, as a rule, serve a useful purpose. Often they merely result in deficits or defaults. The only effective way to keep taxes down is to hold public expenditures within bounds. So long as expenditures are permitted to expand without restraint, a tax limit is not likely to prove of much assistance.

TAX LIMITS.

STATE EXPENDITURES

When money comes into the state treasury, it can be paid out again in only one way, that is, under authority of an appropriation duly voted by the legislature. The appropriation may be specific, designating a certain sum for a certain purpose, or it may be general and continuing, as, for example, when it authorizes a state department to expend such amounts as it may receive in fees. Most of a state's income is appropriated annually or biennially upon estimates of necessary or desirable expenditure submitted to the legislature by the governor or the heads of departments, but appropriations are also made by the legislature on the proposal of individual members.

LEGISLATIVE APPROPRIATIONS.

Until about thirty-five years ago a haphazard system of originating and voting appropriations was in vogue throughout the country. When the legislature assembled, it was deluged with estimates and requests from the various departments, bureaus, boards, and commissions. Each

asked for more money than it had spent during the previous year, and usually for more than it expected to get. These estimates then went to a committee of the legislature or were divided among several committees, whereupon each department and board pulled wires to get what it wanted — and the strongest got the most. It was not a question of merit but of influence. Finally the estimates, after being reviewed and trimmed by the committees, were lumped into appropriation bills (often a dozen of them) and passed by the legislature, after which they went to the governor. If the state constitution empowered him to veto individual items in the appropriation bills, the governor usually did some pruning on his own account; but in many of the states he did not have this power and hence had to accept or reject each appropriation bill as a whole.

THE OLDER METHOD OF MAKING THEM.

Meanwhile, in addition to the appropriation bills, numerous measures providing for special expenditures were introduced by individual legislators. These also were referred to committees, and many of them ultimately passed both houses. Day by day these measures kept sliding through, with nobody doing much to prevent their passage. No one could tell, until the end of the session, how much the total expenditure was going to be. Even then one could not be certain, for many bills were rushed through in the last few hours. Consequently the authorized expenditures often exceeded the state's revenue by a considerable margin and the next legislature had to make good the deficit.

SPECIAL APPROPRIATIONS.

The wastefulness of this haphazard system was long apparent, but little progress in modifying it was made until the states undertook to reform the procedure by the establishment of a regular budget system. This movement began in 1911 and made such rapid progress that today virtually all the states have established some form of budgetary control. Hardly any two of them, however, follow exactly the same methods. A few states place responsibility for the budget upon the legislature, to be handled for it by one or more powerful committees; others entrust the responsibility to a special board which includes both legislators and administrative officers; but three fourths of the states now use the "executive budget" plan.

THE NEWER BUDGET SYSTEMS.

Under this last-named arrangement the governor is made wholly or largely responsible for receiving the estimates of expenditure, revising them, putting them in the form of a budget, and submitting this budget to the legislature with his recommendations. At the same time he submits an estimate of what the state's revenue for the ensuing year is likely to be. The governor, of course, is

THE EXECUTIVE BUDGET.

not expected to do all this personally. He is assisted by some staff agency, such as a department of finance or a budget bureau, the head of which he appoints. On the advice of this agency the estimates are revised and an attempt is made to balance the budget, that is, to make the anticipated revenues and expenditures match each other. Then the governor transmits his budget to the state legislature which refers it to a committee. After this committee has made its report and recommendations, the legislature is usually free to make such changes as it thinks proper — but such action is subject to the governor's veto in states where he possesses power to reject individual items of expenditure.

The governor represents the state as a whole, and the general direction of financial policy may on that account be properly committed to him.

ITS EFFECT ON THE GOVERNOR'S POSITION.

Nevertheless, this tendency to give the governor the sole initiative in expenditures, if consistently followed, will eventually upset the balance of power in state government. It will make the governor supreme, particularly if he possesses the right to reject or reduce any item which the legislature has increased during its passage through that body. Analogous action in city government has raised the mayor to a dominating position and has reduced the city council to virtual impotence. Primacy in government follows the power of the purse. Whoever controls the expenditure controls the government, for very little in government can be accomplished without money. The executive budget system serves the ends of economy, but it does this by curtailing the powers of the legislature and correspondingly enlarging the authority of the executive.

A sound budget system ought to have four essentials, and if these are present the details do not much matter. First, all estimates of revenue

ESSENTIALS OF A GOOD STATE BUDGET SYSTEM.

and expenditure should be prepared and placed in the hands of a budget bureau a reasonable length of time before the legislature meets. Second, there should be, during this interval, a thorough scrutiny of every item by experienced investigators who give all their time to the work. It is absurd to think that a budget calling for the expenditure of a hundred million dollars or more can be properly reviewed in a week or two by a committee of legislators, or by a half-dozen members of an unpaid board, or by a couple of clerks in the governor's office. It is a job for expert accountants and trained investigators. Third, the appropriations should be incorporated, as far as possible, in a single bill, and the consideration of this bill ought to be the first care of the legislature during its session. It should have priority over all else and should be disposed of at an early date. And, fourth, the rules of the legislature should provide that no

appropriation shall be voted after the passage of the budget except on recommendation of the governor or by a two-thirds vote in both houses. This will take care of emergencies.

A budget system incorporating these four essentials will always prove a powerful incentive to sound financing, yet no one should imagine that all extravagance and wasting of public money can be stopped by merely establishing a "system" of some sort. An orderly procedure or routine, in the voting of appropriations, goes only part of the way. It gives the legislature a chance to be economical; but it does not compel economy. There is only one way of compelling legislators to practice economy, which is by bringing upon them a relentless pressure of public opinion in favor of it. If the voters as a whole are in an extravagant mood, or are indifferent to extravagance, no budget system will protect the taxpayer. Hence an aggressive taxpayers' association, organized on a state-wide basis, provided with a competent staff, vigilant in following every move that the legislature makes, and fearless in publishing the facts — such an organization can do much to save the people's money from being wastefully expended.

A BUDGET SYSTEM IS NO PANACEA.

Not all the wastefulness comes in *making* appropriations. Much of it comes in *spending* them. No matter how worthy the purpose of an appropriation may be, there is waste if the money is frittered away without achieving its purpose. In the older days budgetary appropriations were made in the form of "lump sums" and this naturally encouraged wastefulness. Each department head, under this system, enjoyed almost complete discretion in spending his appropriations so long as he kept within the totals, and if he did not need all of it for one thing he used it for another. A certain lump sum, for example, would be voted for "supplies and equipment," but within this total the department head could spend money for all sorts of things whether they were needed or not. To guard against the abuses which often arose out of this administrative freedom, the legislatures began the practice of voting "segregated" budgets, that is, budgets in which each appropriation is broken down into items of individual expenditure. For example, instead of a lump sum for equipment and supplies, the appropriation would specify so much for desks, so much for typewriting machines, so much for ink, for paper, for pens, even for waste baskets. Then the head of the department had to keep his expenses for each purpose within the individual items.

WHERE MUCH OF THE WASTE ARISES.

LUMP-SUM AND SEGREGATED APPROPRIATIONS.

This plan, however, proved too inflexible; it did not take into account the changes in needs which inevitably arose during the year. A depart-

ment head, under this system, would often find himself with too much money for one purpose, while running out of funds for something else badly needed before the year was half over. A compromise between the two foregoing plans has therefore been worked out in some of the states. Known as the "allotment plan," this involves the making of the appropriations in lump sums, but requires that the governor shall parcel out the funds voted to each spending agency in the form of an installment or allotment every three months. Under this arrangement the governor becomes, in a sense, a secondary appropriating authority, for no money (even after it has been voted by the legislature) may be spent unless it has been "allotted" by him. Every spending agency must show that it needs the funds or the money remains unspent. Clearly, this plan gives the governor a real opportunity to prevent wastefulness — if he has the will to do it, which unfortunately some governors have not. More than a dozen states have established this allotment plan of making appropriations.

THE ALLOTMENT PLAN.

As another means of checking needless outlays, it is desirable that every state shall have a system of accounting which makes perfectly clear where every dollar has gone. And before the legislature votes the next appropriations, it should be given an itemized statement showing all payments made — to whom and for what purpose. Legislative committees can then call officials on the carpet to explain and justify. There should be always before the eyes of the spending officials a possibility that they may have to give a detailed explanation of every item. This will help to prevent overpayment for supplies and services, improvident contracts, fees or commissions to political friends, and other common forms of leakage.

OTHER SAFEGUARDS.

Much wastefulness can be avoided by the maintenance of a central purchasing office.[1] Such offices have now been established in nearly all the states, either independently or in connection with some existing department. All supplies, equipment, and materials (with certain exceptions) are bought through the central purchasing authority. An endeavor is made to standardize the various types of supplies (paper, ink, janitor's supplies, etc.) so that orders can be placed in large quantities at low prices. This system is generally replacing the older procedure whereby each department did its own buying, often at retail prices and from favored concerns.

CENTRAL PURCHASING DEPARTMENTS.

[1] For a full discussion see Russell Forbes, *Governmental Purchasing* (New York, 1929), and the same author's *Organization and Administration of a Governmental Purchasing Office* (New York, 1932).

STATE DEBTS

The states, like the nation, have power to borrow money and are unrestricted in the exercise of this authority by any provision of the national Constitution, except that they may not "emit bills of credit," that is to say, they may not borrow by the issue of paper money. But nearly all the state constitutions have set their own limitations upon the borrowing power of the legislature. These constitutional debt limits are of several varieties. In some states a definite sum is fixed, above which indebtedness must not be incurred except for special purposes, or, in some instances, except with the express assent of the people obtained at a referendum. In others, no specific sum is fixed by the constitution, but the purposes for which debts may be incurred are carefully set forth, and borrowing for other purposes is not permitted, except when certain onerous formalities have been complied with. A few states fix the limit of indebtedness at a certain percentage of the total assessed value of taxable property. Finally, some states do not permit the issue of bonds for any purpose except after approval by a majority of the voters at the polls.

DEBT LIMITS.

Naturally there is great variation in the amounts of indebtedness which the several states are carrying. This is not due to the presence or absence of constitutional checks upon the borrowing power, but is mainly attributable to wide differences in what the several states have undertaken to do for their citizens. In estimating the burden of a debt, it should be borne in mind that a state with a relatively large per capita indebtedness does not necessarily impose a heavy burden upon its citizens because its per capita wealth and income, and hence its ability to sustain a debt, may be far higher than in the case of a state with a considerably lower per capita debt. During the period between the two World Wars, state debts increased at a rapid rate because of bond issues for highway construction, soldiers' bonuses, public buildings, and unemployment relief. These debts would doubtless have grown to even greater proportions if, during the depression years of the 1930's, a large share of the relief load had not been assumed by the national government.

IS THE PRESENT DEBT BURDEN EXCESSIVE?

Following America's entry into World War II, however, state revenues began to climb as a result of the wartime boom in production and employment. At the same time, wartime priorities interfered with normal construction programs and other state activities. As a consequence, many of the states found themselves in the unusual, but none the less agreeable, position of ending their fiscal years with surplus funds on

hand. A part of this windfall has been earmarked in many states as a postwar reconstruction fund; the residue has been applied to debt reduction and an appreciable shrinkage in the outstanding obligations of the states has been thereby effected. Nevertheless, the gross debt of all the states is still in the neighborhood of three billion dollars, to which must be added the debts incurred by their political subdivisions — the cities, counties, towns, townships, and local improvement districts, which total a still larger figure. Compared with the astronomical debt which the national government is carrying, these state and local debts seem rather diminutive. But they have to be reckoned into the total when one sets out to figure the per capita debt which the American people are shouldering and on which they have to pay the interest out of their individual earnings. The real burden of a debt depends, of course, on the rate of interest which has to be paid on it, and fortunately this rate has been greatly reduced during the past twenty-five years. Even so, it takes a lot of taxes to service a debt of three hundred billions.

The states borrow money, when they have occasion to do so, by the issue of bonds. These bonds run from ten to fifty years or even longer in some cases. A generation or two ago it was the almost invariable custom to issue bonds with no special provision for having funds on hand to pay them at maturity. Consequently, when the bonds fell due in twenty or fifty years thereafter, there was no easy way of making payment except by reborrowing. Sometimes this could be effected at a saving by the issue of new bonds bearing a lower rate of interest than the old. Paying off old bonds by issuing new ones at a lower rate of interest is commonly known as refunding. Later, it became the practice to provide a sinking fund into which is paid every year out of current income a sum sufficient to enable the bonds to be redeemed when they mature.

METHODS OF BORROWING AND OF PROVIDING FOR REPAYMENT:

1. THE SINKING FUND SYSTEM.

The sinking fund method of providing for the ultimate liquidation of state debts is of course far better than no provision at all, yet in practice it has shown serious defects. The necessary annual contributions to the fund are sometimes omitted for one reason or another, usually because of urgent demands from other quarters. Or money is taken from the fund to meet a temporary emergency and then is not replaced. The sinking funds are occasionally invested without due care and lost. When a state invests its sinking funds, it takes the same risk as a private individual. Because of losses in the past, the laws now restrict the investment of sinking funds in such a way as to reduce the element of risk to a minimum. But in any

DEFECTS OF THIS PLAN.

case, the sinking fund places a large amount of money and securities in the custody of a few officials who are usually chosen by popular vote: namely, the state treasurer or a board of sinking fund commissioners. The temptation to deposit the funds in favored banks or to use them for political or personal ends in other ways is sometimes too strong to be resisted. Hence it often happens, for one reason or another, that sinking funds do not contain enough money, when the time comes, to use them in extinguishing the state's obligations.

2. THE SERIAL BOND SYSTEM.

A better plan of borrowing is to serialize the dates of maturity in such a way that one or more bonds will come due for payment each year. This serial bond plan obviates entirely the need of creating sinking funds. A definite proportion of the debt is regularly extinguished each year by applying from current revenue what would go into the sinking fund, more or less. Many cities now use the serial plan, and some of the states have adopted it with satisfactory results. Between the ultimate cost of the two plans, there is no difference, provided each is carried out exactly as planned. But, in practice, the serial plan almost invariably works out to be the cheaper method of borrowing, for it entails no long holding over and investing of money with the attendant dangers of loss.

NON-CALLABLE OBLIGATIONS.

Nearly all business corporations, in issuing bonds, have made these bonds callable and repayable (at the option of the corporation) under certain conditions before their maturity date. Then, as interest rates go down, they are able to pay off their 5 per cent bonds, let us say, with new money borrowed at 4 or 3 per cent. But the states and municipalities, in issuing bonds, rarely took this precaution until very recent years. Consequently their old high-interest bonds are noncallable until maturity, and this maturity date is often many years away. That is why some states and cities have to keep paying 5 per cent on bonds which they issued fifteen or twenty years ago, although today they could borrow money at half that rate of interest.

TEMPORARY BORROWINGS AND TAX-ANTICIPATION WARRANTS.

In addition to their funded debts, for which long-term bonds have been issued, many of the states have "floating" debts, in other words indebtedness which is financed by temporary borrowing. To cover expenditures which become necessary before the taxes come in, it is customary to arrange for short-term loans from the banks. Or the interval can be tided over by the issue of tax-anticipation warrants. These are drafts on the state or municipal treasury payable at some future date. They are given to contractors and to public employees in lieu of their regular pay

checks. Then the local banks usually will cash these warrants, giving their face value less interest to the date on which they become due.

SOME GENERAL CONSIDERATIONS.

Of old, it was the custom to look upon public indebtedness as a misfortune. But in recent years, some people in and out of public life appear to have the idea that nothing should be paid for out of current income if it can be financed by borrowing and thus passed on to a future generation. Neither of these extreme points of view is sound. When money is needed for public works of an enduring character, such as a state capitol or other public building, or a system of state highways, borrowing is a legitimate and equitable way of obtaining it. The cost of capital improvements may fairly be prorated over the years in which they are destined to render service to the public; and it is neither just nor expedient that the taxpayers of today should be forced to bear their entire cost. A case can also be made for public borrowing in a time of acute economic depression, not only to take care of public emergency expenditures in such a period but also to keep the citizen's tax burden down and thereby keep his purchasing power up. But if such a policy is to be fairly pursued, the government in times of economic prosperity should be ready to increase taxes and reduce the debt. Those who shape public fiscal policy should remember that future generations will have their own sufficient burdens and ought not to be unduly hampered by legacies of debt from the past.

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CHAPTER XLIV

THE STATE COURTS

Justice, Sir, is the greatest interest of man on earth. — *Daniel Webster.*

In addition to the federal courts, which have been already described, every state has its own system of courts established under the provisions of its own constitution and laws. These state courts do not stand below the federal courts. They are on an equal plane and possess full jurisdiction within their own field.

RELATION OF THE STATE COURTS TO THE FEDERAL COURTS.

Between the state courts and the federal courts there are many similarities of organization and procedure, but two essential differences are to be noted. In the first place, the judges are elected by the people in most of the states, whereas there are no elective judges in any of the federal courts. The other difference applies to the range of jurisdiction possessed by the two sets of tribunals. The matters with which the federal courts may deal are explicitly defined in the Constitution of the United States. The federal courts possess such jurisdiction as is there enumerated, and no more. They administer the law of the United States. The state courts, on the other hand, are vested with all remaining judicial authority. They administer the law of the state. And since this law deals with a greater variety of matters, the state courts exercise authority over a wider range, and handle a much larger proportion of the total litigation.

CONTRASTS BETWEEN THE TWO.

In the thirteen colonies, the judges were appointed by the governor or the colonial legislature and, after the winning of independence, this plan was generally continued. The framers of the national Constitution accepted the idea of an appointive judiciary as a matter of course and empowered the President to nominate all federal judges for confirmation by the Senate. As time went on, however, the practice of electing judges came into vogue with the new frontier states of the West. Pioneer communities usually insist that justice shall be speedy, inexpensive, and devoid of technicalities. They want the law administered and interpreted on a "democratic" basis. It

DIFFERENCES AMONG THE STATE COURTS.

1. IN METHODS OF CHOOSING JUDGES.

was so during the development of the great American hinterland. Most of the new states in this region organized their courts on an elective basis and the influence of their example backwashed to some of the older states. In time, very few of the commonwealths, almost all of them from among the original thirteen, continued to select judges by some other method than that of popular election. Recently, however, there has been a slight trend away from this method, and some seventeen states have one or more grades of judges (in one case, only judges of the court of claims) selected by the legislature, by the governor, by other judges, or by a process which combines appointment by the governor in association with a judicial commission, and eventual ratification or rejection of the appointment by the voters.

No two states have exactly the same system of court organization or of judicial procedure. Yet the differences are not great save in one case. This is Louisiana, where the civil procedure has been influenced by the Code Napoleon of France. In the other forty-seven states, the backbone of judicial procedure is uniformly that of the common law, originally derived from England. The pattern of procedure in the federal courts has also exerted an influence in the direction of uniformity and the courts of one state often rely upon the precedents, procedural and otherwise, of courts in other states. Hence it is that when a man studies law and is admitted to practice in one state, he finds himself at no great disadvantage if he moves to another. The fundamentals are the same. It does not take him long to familiarize himself with the differences in procedure and terminology.

2. IN PROCEDURE.

In every state there are three grades of courts, and sometimes more. First, there are the local courts presided over by justices of the peace, municipal justices, or similar officers, who are chosen by popular election in all but a very few states. The jurisdiction of these local courts is limited to civil and criminal cases of relatively minor importance. Frequently, however, the local justice conducts the preliminary hearings where serious criminal charges have been made and determines whether or not the accused shall be held for the grand jury or for trial by a higher court. These local courts do not usually hold jury trials; their procedure is of a summary character and their decisions are subject to appeal. As a rule, the justices of the peace in rural districts have had no training in the law, but in towns and cities it is customary to choose men who are better equipped. In most of the cities, the unpaid justices of the peace have been replaced by salaried magistrates or police justices who hold court every day.

PRESENT ORGANIZATION OF STATE COURTS:

1. THE LOWEST COURTS:

IN RURAL AREAS.

A word should be added with respect to the local courts of the cities — municipal courts, magistrates' courts, or police courts, as they are variously called. The judges or magistrates in these courts are usually elected by the people, but sometimes they are appointed by the mayor. In a few states they are selected by the governor of the state in which the city is located. There may be several of these courts in the same large city, each working independently; but in most of the largest municipalities they have become consolidated into a unified municipal court. This court then divides its work among various sections or branches which deal with traffic cases, juvenile offenses, small claims, domestic relations, civil controversies, etc., each confining itself to its own special field.

IN CITIES.

The work of these local courts is of greater importance than most students of government realize. They deal with an enormous number of cases and come into contact with more people than do all the other courts put together. Hence it is from them that the average man obtains his opinion of American justice. When these courts are arbitrary, inefficient, or corrupt (as has too often been the case), they throw public suspicion on the whole judiciary, no matter how competent, fair, and honest the higher courts may be. Unfortunately the personnel and work of the local courts, especially in the cities, have been too often made the prey of party politics. Big and little bosses have frequently controlled the selection of judges and magistrates. Justice, too often, has been tempered by political favoritism. Any reform of the judiciary, to be effective, must therefore begin at the bottom. The local courts are lowest in jurisdiction but not in importance.

IMPORTANCE OF THEIR WORK.

Next comes a higher range of courts, known by various names. Most commonly they are called county courts, but sometimes appellate courts, district courts, superior courts, circuit courts, or courts of common pleas. But whatever they may be called, they are the lowest courts of record, that is, they are the courts lowest in the judicial hierarchy which keep a complete transcript of the testimony, pleadings, and disposition of the issues of a case and observe an established procedure. They may hear appeals from the decisions of the local justices and also have original jurisdiction, that is, jurisdiction in the first instance, over a considerable range of cases, both civil and criminal. Sometimes separate courts of the same grade are established for criminal and civil matters, or a separate section of the same court may be set up to hear and determine civil or criminal causes. These courts are staffed by regular judges who have been trained in the law. On points of law there is usually a right of appeal from these tribunals to a court of

2. THE COURTS OF RECORD.

appellate grade or to the supreme court of the state. In many states, the county court is given charge of probate matters when no special probate courts exist; and, in some states, it also has various administrative functions, such as supervision over road construction and poor relief. This is a legacy from England where the county courts, in the old days, performed many administrative duties.

THE GRAND AND PETIT JURY IN STATE COURTS.

It is to the county courts that the grand jury makes its report and presents its indictments on the basis of which the local county or district attorney prosecutes criminal charges.[1] Occasionally, in lieu of a grand jury indictment, the district attorney may lodge what is known as an *information* with the court, alleging sufficient ground for a prosecution; and such a statement will suffice to begin a criminal action in the court. Almost invariably the county court sits with a petit or trial jury, which decides all questions of fact, questions of law being supposedly decided by the judge. Traditionally, the trial jury, in the state courts, as in the federal courts, is a common law jury of twelve men (or men and women) chosen from the community. Several of the states have, however, modified the jury system considerably. Nearly all of them, for example, permit the parties to a civil suit to dispense with a jury altogether. The great majority of the states also permit the accused to waive a jury in a case where a minor offense is charged; and about a third of them allow the same privilege where a more serious offense is in issue; none, however, permits a waiver in capital cases. The ancient requirement of unanimity in verdicts has also been modified here and there in civil actions, and occasionally in criminal cases of minor degree, an affirmative vote of two thirds or three fourths of the jurors being sufficient for a verdict. Likewise, most of the states now accept a jury of less than twelve members, some requiring only half that number in civil cases, and a few have made the same change in criminal prosecutions where the offense is not of a capital nature.

DISSATISFACTION WITH THE JURY SYSTEM.

These changes are evidence that there is some dissatisfaction with the jury system. Occasionally, indeed, the more impetuous reformers have suggested its abolition altogether. This is a situation which cannot be passed over lightly by those who still consider trial by one's peers a cornerstone of free government. Much could be done to reduce prevailing dissatisfaction if the jury were restricted to its proper role of deciding merely the issues of fact, and if the law allowed judges greater discretion in guiding its deliberations. Improvement would also result in the quality of jurors

[1] For the organization and procedure of grand juries, see p. 561.

if the too numerous exemptions, which now permit various classes of citizens to escape jury duty, were abolished. These exemptions usually include professional men of all types as well as persons employed in the public service. Too often the discourtesy shown to jurors by court officials and the attitude exhibited towards them by the general public gives the impression that the jurors are the culprits in a case rather than the accused and that jury duty is a kind of civic penalty rather than a patriotic service to the commonwealth. Instances have been known in which the jurors were locked up (to keep them from being influenced) while the prisoner was out on bail. It is not surprising that men who have important business of their own demanding attention should seek to avoid a duty which requires them to sit on a hard bench all day, and day after day, listening to the verbosity of lawyers. The jury system would function more satisfactorily if judges were given more authority to shorten the proceedings.

3. HIGHER COURTS. THE INTERMEDIATE TRIBUNAL.

Above the county court, in some states, there is frequently an intermediate grade of tribunal known by various names, such as the court of appeal. In New York State, this court is known as the "supreme court," but it is not supreme in fact, since the highest New York court is known as the court of appeals. The functions of these intermediate courts are chiefly appellate, that is, they review questions of law which are appealed from the lower courts. In some matters their decisions are final, hence they lighten the burden of appeals to the state's highest court.

THE SUPREME COURT OF THE STATE.

This tribunal, known generally as the supreme court,[1] usually consists of from five to seven justices; although four states limit its bench to three justices, while New Jersey's court, by far the largest, has sixteen justices. Normally, the entire bench of the court sits in a case and renders a decision by a majority vote; but, in more than a third of the states, the membership may be divided into sections to hear and decide certain cases. Sometimes the justices sit individually, but only to deal with routine matters such as the hearing of motions or the issuance of temporary writs. In at least eight states, moreover, the supreme court may sit in more than one city to hear and decide cases. In a few instances, the justices are appointed by the governor or elected by the legislature, but in most cases they are elected by the voters, often on a nonpartisan ballot. Where the justices are elective, they are sometimes chosen by the voters in special judicial districts

[1] In Maine, Massachusetts, and New Hampshire, it is called the "supreme judicial court"; in Connecticut, the "supreme court of errors"; in Virginia and West Virginia, the "supreme court of appeals"; in Kentucky, Maryland, and New York, the "court of appeals"; and in New Jersey, the "court of errors and appeals."

instead of in the state at large, thus providing an element of geographical representation. Terms vary all the way from two years in Vermont to twenty-one years in Pennsylvania. Three New England states, Massachusetts, New Hampshire and Rhode Island, grant their justices tenure for life or during good behavior. The normal elective term is six or eight years, but even in these cases long tenure is the rule because of the practice of reelecting justices at the end of their terms. Compensation is usually higher than in other branches of the public service, varying from $3,000 in South Dakota to $22,000 in New York, the usual salary being about $7,500. A chief justice presides over each supreme court.

ITS FUNCTION.

The state supreme court devotes itself almost entirely to the hearing of appeals on points of law. Only in exceptional cases does it exercise jurisdiction by hearing cases in the first instance. Not having to do with questions of fact, it does not sit with a jury. On most matters its decisions are final. They are final whenever the issue relates solely to rights claimed under the constitution and laws of the state, with no important question of federal right involved. And this is true of more than nine tenths of the litigation in the state courts. If, however, the controversy involves some substantial right claimed under the federal Constitution or the national laws or a national treaty, an appeal may usually be taken by a writ of certiorari to the Supreme Court of the United States.

THE SUPREMACY OF THE STATE COURTS IN THEIR OWN SPHERE.

This point will bear emphasis, for there is a widespread popular impression that all state courts are subordinate to all federal courts, that the lowest court in the federal system is superior to the highest court in the state. But the federal and state courts do not form a hierarchy, one above the other. They run parallel. Each set of courts is independent, each has its own field of jurisdiction, and within that field each is immune from interference by the other. When you start a suit at law, your lawyer will advise you whether it should be begun in a state court or in a federal court. His advice, if he is a good lawyer, will depend on the nature of the suit and the residence of the suitors. If the issue concerns matters or persons within state jurisdiction, the state courts handle it; if it concerns matters or persons within federal authority, it goes before the federal courts. In some cases, particularly where the parties to a civil suit are residents of different states, there may be an option [1] on the part of the plaintiff or defendant. And if a suit is entered in one court, and it subsequently appears that it should have been entered in another, it can be removed thereto.

[1] See p. 554.

Most of our judicial work and expense falls on the states. The vast majority of prosecutions and lawsuits originate in the state courts, are decided there, and go no farther. When the highest court of a state has rendered its decision, there is only a limited possibility of appealing to the United States Supreme Court. To do so, as indicated in an earlier chapter, it must be shown that the highest state court having jurisdiction has held valid some state law which is alleged to violate the federal Constitution, a federal law or treaty, or has declared a federal law or treaty invalid. On rare occasions also, the Supreme Court may review a case in which the state court has held a state law contrary to the federal Constitution, laws, or treaties. If an appeal is taken, an appropriate writ, nowadays normally the writ of certiorari, is directed to the state court calling up the case. But the United States Supreme Court has circumscribed the right of appeal even further by refusing to issue a writ "unless it appears affirmatively that not only was a federal question presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." [1] In at least 99 per cent of the cases which are adjudicated in the state courts, this condition cannot be met and there is consequently no appeal.

APPEALS TO THE UNITED STATES SUPREME COURT.

When you hear that a state law has been declared "unconstitutional," this may mean either of two things: first, that the supreme court of the state has declared it to be in conflict with the state constitution or, second, that the Supreme Court of the United States has declared it to be in conflict with the national Constitution. It may, indeed, be in conflict with both, but as a rule it is the state constitution that forms the barrier. Let this point sink into the reader's mind, for nine laymen out of ten think only of the national Constitution when they hear that some state law has been shattered by a head-on collision. Most state laws, when they come to grief, do so at the hands of their own courts.

HOW STATE LAWS MAY BE DECLARED UNCONSTITUTIONAL.

In addition to its regular tribunals, every state has certain courts of a special character. Among these are probate or surrogate courts for the settlement of questions relating to wills and inheritances, although in some states there are no special courts for these matters, the work being done by the regular county courts. In a few states, there are land courts which have to do with the investigation and registration of land titles. In one or two others, there are courts

SPECIAL STATE COURTS.

[1] De Saussure *v.* Gaillard, 127 U. S. 216.

of claims to decide cases in which private parties are permitted by the state laws to sue the state. The regular courts, moreover, often appoint persons known as referees or masters, to ascertain and report on facts which are highly complicated and would take too much of the court's time to unravel. This is done, for example, in suits which arise over the keeping of accounts or the management of trust funds. The referee, or master, hears the testimony of accountants and others; he ascertains the facts as best he can and submits his findings to the court, which uses them in reaching its decision. Thus it will be seen that the tendency is towards specialization in both the organization and work of the courts.

In general, it is the function of all the state courts, regular and special, to decide only cases which actually come before them. Courts do not pass upon hypothetical cases; they have enough to do in dealing with controversies which actually arise. But in about one fifth of the states, the constitution provides that the governor or the legislature may call upon the justices of the state's highest court for an "advisory judicial opinion" on the interpretation or constitutionality of an existing law or a proposed law. Inasmuch as such advisory opinions are necessarily given without the opportunity of hearing counsel on both sides, they are not binding on the court in case an actual controversy on the point arises later, although one state, Colorado, appears to have given such advisory opinions the status of final judicial determinations. But though they may be merely "advisory" in nature, such opinions are of great value, especially to legislatures, and on numerous occasions have forestalled the enactment of laws which, had they been enacted, would have been declared invalid.

ADVISORY JUDICIAL OPINIONS.

There is another exception to the rule that court decisions are restricted to actual suits: namely, the right of the courts in some states to render "declaratory judgments." [1] Within recent years a number of American states have authorized their courts to pronounce, on matters of existing law, declarations which have the force of judgments, although no lawsuit is actually before them. The idea is to enable the courts to explain, in advance of numerous controversies, such matters as the meaning of a "community property law," or a new statute relating to land titles. In other words, the courts are empowered to make clear what the rights and obligations of the citizen are before litigation arises, not after it. Thus the declaratory judgment is an agency of preventive justice, supplementing the courts' regular function of remedial justice.

DECLARATORY JUDGMENTS.

[1] E. M. Borchard, *Declaratory Judgments* (second edition, Cleveland, 1941).

SOME CURRENT PROBLEMS CONNECTED WITH STATE COURTS

Several important questions come up in every discussion of the state courts and their work. The first relates to the method of choosing judges.

I. THE ELECTION OF JUDGES.

This is an old question; lawyers and statesmen have been wrangling about it for over a hundred years. Choosing judges by popular vote is an American contribution to the science of government and one which other democracies have not copied. Yet popular election of judges has acquired so extensive a vogue in the United States that selection of a judge of a regular court by any other method is an unusual proceeding in any state west of the Alleghenies. The reasons for this extension of the elective principle are partly historical and partly the outcome of practical considerations. During the period when the frontier spirit dominated a large part of the United States, there developed the idea that true democracy involved popular control over the law-enforcing, as well as over the lawmaking, branch of the government. If all able-bodied citizens were equal before the law, they ought to be given an equal share in making the laws, enforcing them, and interpreting them. Hence, every citizen was qualified to be a lawyer and every lawyer competent to be a judge — if he could get his neighbors to elect him. This equalitarian philosophy was well enough suited to a pioneer era and found wide acceptance. Quite as important, moreover, was the practical consideration that legislatures and governors, in these earlier days, often appointed judges of a pettifogging temperament who were so engrossed with technicalities that they did not dispense justice simply and speedily, as befitted a democratic community.

So the principle of having judges elected by the people spread through the newer West, and surged backward to the older East, until eventually it gained acceptance in more than three fourths of the states. In actual practice, however, the voters do not really choose the judges. How, indeed, can a body of a hundred thousand voters obtain the knowledge necessary to ensure the placing of legal knowledge, sound judgment, and integrity on the state bench? The answer is that the people do not have such knowledge and do not usually presume to have it. In many states, there is a tradition that a judge, when once elected, shall be retained in office so long as his conduct is satisfactory. This means that vacancies on the bench rarely occur except when a judge dies or resigns. When vacancies come in this way, the governor is usually given the right to make an appointment

HOW THE SYSTEM OF ELECTIVE JUDGES HAS WORKED OUT.

THE INFLUENCE OF INTERIM APPOINTMENTS.

until the next election, and this appointee is then likely to be a candidate with the chances much in his favor. Many elective judges, therefore, really owe their election to a governor's temporary appointment.

If it happens, on the other hand, that a judge retires upon the expiry of his elective term, the choice among aspirants for his place is usually made, in the first instance, by the leaders of the political organizations. They regard judgeships as a form of high-class political patronage. All that the voters can do, as a rule, is to make their final choice from among the candidates thus presented to them by political leaders who desire to bring the judiciary into the orbit of partisan politics. Occasionally, to make the assurance doubly sure, the leaders of the opposing political parties go into conference and agree upon a bipartisan slate of candidates, each organization getting its share. In some states, there are no party designations on the judiciary ballot, in which case the state bar association (or organization of lawyers) is in the habit of recommending a slate of candidates to the voters.

INFLUENCE OF BAR ASSOCIATIONS AND OF POLITICAL LEADERS.

"How did you manage to get elected?" said a newspaper reporter to a young New York lawyer who had just received a majority at the polls. "I was not elected; I was appointed. The boss appointed me and the people took his word for it," was the frank reply. Elective judgeships are often, in reality, appointive. The appointing power resides somewhere — with the political bosses, or the state party committee, or the state bar association, or the governor through the filling of vacancies. Whether the plan of election works well or badly depends upon the way in which this appointing power is exercised. When good candidates are nominated, good judges are chosen, and the reverse is equally true. Some excellent judges have owed their places on the bench to popular election and some of the worst have found their way there by the same method.

POPULAR ELECTION OF JUDGES ALMOST ALWAYS MEANS *de facto* APPOINTMENT.

It is commonly assumed by reformers, but it is by no means certain, that the state judiciary would be notably improved if we were to abandon the practice of electing judges and provide for their appointment by the governor in all cases. For most governors, be it remembered, are politicians of high degree. They work hand in hand with the party organization, and their appointing power is generally influenced by a desire to help it. There are all sorts of governors, as there are all sorts of electorates. Figs do not grow on thistles. There is no reason why the wrong sort of governor should appoint the right sort of judge. The plan of having the governor appoint

IS THE APPOINTIVE SYSTEM BETTER?

judges for life has functioned admirably in a few states. It has put their courts on a high plane of competence and nonpartisanship. Outsiders point to this as an example of what other states might secure by adopting the same plan of selection.

But it does not follow. In such states as Massachusetts, Maine, and New Hampshire, where the governor appoints the judges, or Connecticut, where the governor nominates them and the legislature chooses them, good judges have been secured by electing good governors. If the office of governor deteriorates, the judiciary will descend with it. These states, moreover, have done no better than Wisconsin, Iowa, and Maryland, for example, where judges are chosen by popular vote. In each state the people get the sort of judiciary they insist upon having; whether they use the method of election or appointment does not make a world of difference, although it is much easier to fix the responsibility for a poor choice when the latter method is used.

RECENT ATTEMPTS TO COMBINE APPOINTIVE AND ELECTIVE METHODS.

Criticism of the elective principle has recently brought about one or two novel experiments in judicial selection in which the elective and appointive principles have been combined. In California, since 1934, a supreme court justice, at the expiration of his term, may "run against his record," that is, he can have his name placed upon the ballot without opposing candidates, and the voters then reelect or reject him.[1] If they reject him, the governor then nominates someone else who must subsequently be confirmed by a special judicial commission which includes the chief justice and the attorney general. This same procedure is followed when a vacancy occurs between elections. A nominee thus appointed and confirmed remains on the bench until the next general election, when he must be accepted by a majority of the voters if he is to continue for the full statutory term. A somewhat similar plan is used in Missouri for the metropolitan area around St. Louis, although in that state nominations are made to the governor by a judicial committee of selection, and the governor's appointment must subsequently be confirmed by a majority of the voters. The apparent purpose of this rather complicated scheme is to preserve the principle of popular voting but guarantee that the candidates will be men of training and experience.

Closely connected with the question of appointing judges is the method of removing them from the bench. Judges of the federal courts may be removed in one way only, that is, by impeachment. State judges, in all but three states, may be removed by impeachment also, but the process

[1] If he does not wish to be a candidate for reelection, the governor names one, so that in any event only one name appears on the ballot.

of impeachment is not the same in all the states. As a rule, however, the charges are framed by the lower chamber of the state legislature and the impeachment is heard by the state senate. Aside from impeachment, there are several other methods by which a judge may be removed before the expiration of his term. In a half-dozen states, the magistrates of inferior tribunals may be removed by the bench of a higher court. In more than half the states, certain judges may be removed by a joint address (or resolution) of the legislature or by the governor at the request of the legislature. Finally six states permit the recall of judges from office by popular vote. This device is elsewhere explained with respect to the executive and legislative branches of state government;[1] its machinery and workings are much the same when applied to the judiciary. A petition signed by a designated number of voters is presented asking for the recall of a judge from office. The question is put upon the ballot, and if the popular verdict is adverse, the judge steps down. The reputed merit of the plan is that it serves to keep the interpretation and enforcement of the laws in harmony with public sentiment. On the other hand, the objections commonly urged against the recall of administrative officials apply with even greater force in the case of judges.

2. THE REMOVAL OF JUDGES.

THE RECALL OF JUDGES.

Some years ago, Colorado adopted a constitutional amendment by virtue of which the recall procedure might be applied not merely to the judges but to their decisions. The arrangement, briefly stated, was this: whenever the supreme court of Colorado declared a law unconstitutional, a stated number of the voters might petition for a popular referendum on the question of enforcing the law in spite of the court's ruling. And if the people voted affirmatively, the law would be enforced. But the supreme court of Colorado declared the constitutional amendment providing for the recall of judicial decisions to be itself unconstitutional, that is, in conflict with the provisions of the federal Constitution.

THE RECALL OF JUDICIAL DECISIONS.

Many other problems are connected with the organization and work of the state courts at the present day. The judicial system, in most of the states, is largely a heritage from the past. Starting with a simple organization, well adapted to the needs of a century ago, the older states have steadily added more judicial machinery bit by bit, until there is no longer any unity or coherence to the whole. The jurisdictions of the various courts, regular and special, are so badly articulated that even the judges are themselves very often in doubt.

3. THE REFORM OF COURT ORGANIZATION.

[1] See p. 672.

The procedure of the state courts has also come in for much criticism. Litigation is slow and expensive. The poor litigant, or even one moderately well off, may find the quest for justice so time-consuming and costly that he comes to consider it a burden rather than a privilege. The jury system, especially in civil cases, has been so heavily overworked that it is breaking down. The lower courts are doing so much unsatisfactory work that the higher tribunals are deluged with appeals; their calendars have become so badly congested that if an appeal is entered today it may be a year or even two years before the case can be heard. The delays, the expense, the technicalities, and the uncertainty — they all tend to work injustice. They play into the hands of the shyster and his clients. The student of civics who told his teacher that "a courthouse is a place where justice is dispensed with," was not so far wide of the mark as those who laughed at him may have supposed.

4. THE REFORM OF COURT PROCEDURE.

Certain it is that American state courts give the crook a better run for his money (when he has the money) than he would obtain in the courts of any other country. He can secure postponements, file exceptions, enter pleas in avoidance, challenge jurors endlessly, or secure a change of venue, or appeal, or get a stay of sentence, or give bail and jump it, or be let off on probation. It is not that the judges encourage this situation, or are in any considerable measure responsible for it. Their hands are tied. They are compelled to follow a procedure which is laid down for them. This procedure has been framed by lawyers, in the interest of lawyers — not by judges in the interest of justice. Much of the procedure is archaic and quite out of keeping with the needs of today. It needs to be reformed.

What many of the states ought to do is to reorganize and simplify their entire hierarchy of courts from top to bottom. To this end it has been proposed that all the courts of a particular state should be unified into one tribunal with appropriate departments and divisions, with the chief justice (with or without a few associates) given power to transfer cases, assign judges, and establish minor procedural changes. Under a coordinated bench of this type, crowded dockets could be more readily cleared and opportunity afforded for a greater degree of specialization by various judges in particular types of cases. Possibly also the procedure for making appeals could be simplified, the more archaic technicalities dispensed with, record keeping systematized, and the entire judicial process toned up. At any rate, this suggestion of a unified judiciary has more to commend it than many of the projects in the arsenal of the political reformer. But

A PROPOSAL TO UNIFY STATE JUDICIARIES.

lawyers, as a class, are not enthusiastic about any such overhauling and their influence in legislatures is powerful. As the English jurist, Jeremy Bentham, pointed out long ago, it is believed to be of advantage to the legal profession that the courts and the law should remain (like a physician's prescriptions) somewhat beyond the layman's comprehension. Otherwise there would not be so much business for lawyers.

THE JUDICIAL COUNCIL.

Another step in the direction of reform is embodied in the judicial councils which were first established in Ohio and Massachusetts two decades ago and which now exist in somewhat more than half the states. Composed usually of judges and lawyers and with memberships varying from a minimum of five to a maximum of more than fifty, these councils compile judicial statistics and engage in research on matters relating to judicial organization and procedure. Up to the present, at least, most of these bodies have been relatively innocuous. They can, and often do, make recommendations to the legislature and sometimes to the courts directly for expediting judicial business; but they are essentially fact-finding and advisory bodies. With but one exception, they have no administrative or supervisory powers over the actual activity of the courts.

5. THE DEBATE OVER JUDICIAL REVIEW.

Finally, there is the ever-recurring question whether the courts of the states should retain their power to declare state laws unconstitutional. This power they are now exercising freely and in the face of much criticism from various elements among the people. Not infrequently the supreme court of a state invalidates a law by a divided vote of its own justices, the court standing five to four or four to three. The reasons given for their action, in many instances, are so technical that intelligent laymen (and sometimes lawyers as well) find difficulty in following them. A state law is unconstitutional, for example, if it deprives a citizen of his property without "due process of law," for such a clause (or its equivalent) appears in practically all the state constitutions as well as in the fourteenth amendment to the Constitution of the United States. But what is due process? It is virtually impossible to give a precise definition of that term.[1] Due process is what the court says it is. It is one thing today and may be another thing next autumn.

THE "DUE PROCESS" CLAUSE.

It has been remarked that "giving a man due process is giving him a square deal" — but the squareness of a deal varies with a man's point of view. Hence it is that the due process clause gives the judges wide latitude in testing the constitutionality of laws. Presumably they follow previous decisions of their own and

[1] See p. 520.

other courts; but these do not provide a hard-and-fast rule. The truth is that their yardstick is often their own opinions, particularly when novel legislation is up for consideration. And since judges are of diverse opinions in different states, there are no two states in which due process of law means exactly the same thing. Thus, a zoning ordinance may be held to deprive a man of his property without due process of law in one state, while the same ordinance, word for word, is held to afford due process in another. Under such circumstances, the layman may be pardoned for believing that the courts are exercising far too much discretion in determining public policy and thereby usurping the place of the legislature.

CURBS ON THE COURTS' POWERS.

Judicial review is a characteristic American institution and there are few critics who would abandon it altogether; but there are some who would curb what they consider its excesses. Efforts to curb it have, in fact, been more numerous and more effective than is commonly supposed. The constitutional initiative, introduced in several states, was partly designed to provide the electorate with a weapon which could be used to change a clause of the constitution when such a clause had been invoked by the courts to invalidate a popular law. Indeed, the whole trend towards expediting changes in the constitution by means of the referendum and otherwise, and the frequency with which the process of amendment is used, has provided an effective check on the courts' power since amendments can be, and have been, used to cancel decisions of the courts. Attention has been called to the abortive attempt of Colorado to provide for the popular recall of judicial decisions, still another proposal to limit judicial discretion. In three states (Nebraska, North Dakota, and Ohio) more than a majority of the judges is required in order to declare a state law unconstitutional. At the present time, indeed, there seems to be less likelihood that the highest state courts will abuse their power of review than that this power will become so attenuated by the curbs erected against it as to lose most of its earlier significance.

SOME SUGGESTED REMEDIES.

Much could be done to overcome lack of confidence in judicial decisions and the prevailing irritation with them if the highest state courts would introduce a greater degree of uniformity in their decisions on constitutional questions, especially where issues common to legislation in many states are presented. Constitution-makers might also help the situation if they were less prone to use phraseology which is legalistic, ambiguous, or obscure. Finally, it has been suggested that little would be lost and much gained in promoting uniformity of decisions, if the states would eliminate from their

constitutions those provisions which substantially duplicate the federal Bill of Rights and the other safeguards for life, liberty, and property, which are contained in the national Constitution.

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CHAPTER XLV

THE REORGANIZATION OF STATE GOVERNMENT

No government can expect to be permanent unless it guarantees progress as well as order; nor can it continue to secure order unless it promotes progress. — *John Stuart Mill.*

Surveying American state government as a whole, what are its most obvious defects and by what steps may they be remedied? There is a widespread but none too well founded impression that state government in the United States has been rather satisfactory. One reason for this may be found in the fact that the government of cities, on the whole, has been so much worse. Their misgovernment engaged, for many years, most of the reformer's attention. The defects of state administration, moreover, have been to some extent screened by the way in which the federal government has stepped in and helped the states with their emergency problems. Had it not been for this federal assistance during recent years, the inherent weaknesses of state government would have stood out in much bolder relief.

STATE GOVERNMENT HAS BEEN LESS SATISFACTORY THAN IS COMMONLY REALIZED.

The shortcomings of state government are due in part to faulty organization. The thirteen original commonwealths began with a scheme of government which was well suited to the needs of pioneer communities. Public administration was a simple task in those days. The chief and almost the only function of a state government was to make laws. But during the past hundred years, there has been an enormous expansion in the work which a state government is expected to do. Administration in all its branches, particularly in its application to social, economic, and humanitarian activities, has grown to huge proportions and now quite overshadows all else. Governing an American commonwealth has become a formidably complicated business.

REASONS FOR THIS SITUATION.

Yet the states are trying to carry on with the old machinery. They are endeavoring to conduct great public enterprises (such as the building of highways, the safeguarding of the public health, and the supervision of

business corporations) with an organization which was designed for the making of laws and the protection of popular liberties. They are trying to get from an old-fashioned steam engine the performance of a Diesel motor. The ancient mechanism has been patched up, added to, and otherwise tinkered with, so that it has not entirely broken down under the load; but no state has as yet been courageous enough to scrap the old machine and install a wholly new one.

STATE FUNCTIONS HAVE OUTGROWN THE OLD MACHINERY.

For the most part, the tinkering process has been carried on by constitutional revision and amendment. State constitutions, as a rule, are easy to change — so changes are made almost every year. Sometimes as many as a dozen proposed changes appear on the ballot at a single election. Things are put into the constitution one year and taken out the next. Whole statutes are sometimes submitted to the people as amendments to the state constitution. Then, when changes are desired, more amendments become necessary. Even appropriations for certain public buildings are occasionally voted as constitutional amendments. The result is that many state constitutions have been extended to inordinate length, are full of detailed provisions, and are no longer what they were originally intended to be: namely, documents representing a consensus on the fundamental principles of government.

THE ESSENTIALS OF A SATISFACTORY STRUCTURE:

Constitutional revision, in some of the states, has become a continuous performance. A new edition is needed annually. Limitations of every conceivable sort are crowded into these documents until the legislature, the governor, the administrative departments, and even the courts find themselves without sufficient elbowroom for the satisfactory performance of their respective duties. Details of governmental organization, rules of procedure, and even the salaries of officials clutter up the pages. A document which is supposed to bestow an endowment of power is being transformed into a governmental straitjacket. The reconstruction of state government should begin, accordingly, with the state constitution itself.

1. FEWER CONSTITUTIONAL PROVISIONS, ESPECIALLY IN THE WAY OF LIMITATIONS.

Constitution-makers should return to the true purpose and the proper scope of a constitution, which is to set forth the basic principles and the general organization of government, not to provide a code of laws. There is little need for this relentless piling on of limitations. Neither the liberty of the individual nor the welfare of the community demands it. The restrictions which stand in the federal Constitution are relatively few,

THE NEED OF A RETURN TO FIRST PRINCIPLES IN CONSTITUTION-MAKING.

yet who will say that the rights of the citizen are less sufficiently guarded there? Who will assert that the states, with their constitutions a hundred pages long, have found in these highly elaborated documents a more effective instrumentality of government?

2. LESS REVERENCE FOR THE FORMULA OF DIVISION OF POWERS.

The time has come, moreover, to resurvey the doctrine of checks and balances in its practical workings. For three or four generations in America, it was accounted political heresy to question the infallibility of this dogma. It was reverenced as the very cornerstone of the democratic edifice. To eliminate it seemed quite out of the question. One might as well move to repeal the law of gravitation. Today, however, this attitude is visibly changing. The idea that "power must be a check to power" has been repudiated in several hundred American cities and is being rudely assailed as an obstacle to efficient government in the states as well. Especially in times of economic stress the people want action, not deliberation. They have become impatient of the continual lack of team-play between the two legislative chambers and between the legislature and the executive. Public opinion is inclined to applaud any executive who rides roughshod over checks and balances in order to accomplish things.

MERITS AND DEFECTS OF THIS FORMULA IN ITS PRACTICAL APPLICATION.

A government organized upon the principle of divided responsibility draws both strength and weakness therefrom. Division of powers makes for safety. It provides the ship of state with watertight compartments. When one compartment floods, the others hold firm, keeping the craft afloat and on its course. So long as the balance of powers is preserved, no one branch of government can arrogate to itself any dangerous excess of authority. But, on the other hand, the system of checks and balances means that action will often be slow, indecisive, the result of compromises, and with no concentration of responsibility for what is done. Moreover, this system of segregated authority impedes effective leadership. The chief executive of the state cannot be sure of exercising a dominant leadership because the legislature may, and often does, refuse to follow him. On the other hand, the legislature cannot produce its own leader because the governor stands in the way.

THE THREE ESSENTIALS.

The three prime essentials of effective government are responsibility, harmony, and leadership. Is it wise to sacrifice all three in the interest of keeping a government "safe" by precluding the concentration of power anywhere? In the case of the national government, that question quite properly received an affirmative answer in 1787, for the federal Constitution represented a

novel and precarious experiment. The states were asked to give over great powers, and they were wise in taking no chance that a despotic exercise of this vast authority should some day dissipate all that the Revolution had won. Hence, safety was the first consideration in planning the new national government. But time and circumstance have now changed the situation. Rightly or wrongly the people seem to have lost their fear of overpowering executives.

IN STATE GOVERNMENT THE MERITS DISAPPEAR.

And in the case of the state governments, there never was an equally strong reason for adopting a scheme of divided powers as a safeguard against executive dictatorship or legislative tyranny. The national Constitution guarantees to every state "a republican form of government," which means that the whole strength of the Union is available to protect the people of each state from any gross infringement of their liberties. So long as a system of free government is maintained in the nation as a whole, the danger of a permanent despotism in any state is rather fanciful. Accordingly, it may be questioned whether the principle of divided powers ought to be given full recognition in state government. Today it is probably doing more harm than good. This is because the states have pushed the principle of separated powers to an extreme, enforcing it not only as between the legislative, executive, and judicial organs of government but even within the executive branch itself. In the national system, the President remains the supreme administrative authority, sharing his powers with no one else. But the state governor, as has been shown, occupies no such position. He is frequently held responsible by the voters for the work of state officials whom he does not appoint and whom he cannot remove.

AND THE DEFECTS ARE MAGNIFIED.

THE LOGICAL CONCLUSION.

It would appear, therefore, that a clean-cut division of powers is no longer needed by the states in the interest of safety; that it impairs the responsibility of state government to the people and stands in the way of vigorous political leadership; that it has been carried to an extreme in the decentralizing of executive power; and that the states should seek a greater concentration of political authority.

BUT IF THE DIVISION OF POWERS BE ABANDONED, WHAT THEN?

But by what type of organization might the present system be replaced? Two courses are open. The legislative branch of state government might be restored to a position of supremacy and given full control of the executive, or, as an alternative, the powers of the executive might be so increased as to make the legislature a subordinate branch of state government. The former alternative would be in line with the practice of

responsible government in other countries. It would place the governor in the position of a prime minister, dependent on the legislature for continuance in office but, at the same time, vested with full responsibility for legislative leadership. Such a plan, however, is not likely to find much favor. It is out of keeping with American political traditions. The whole development of state government during the past fifty years, moreover, has been entirely in the other direction. The legislatures have nowhere been increasing their control over the executive; they have been sinking to a less dominant place in the active direction of public policy. Constitutional amendments have been circumscribing the powers of state legislatures while the progress of the executive branch to greater prestige and power has gone steadily forward.

THE DECLINE OF PUBLIC CONFIDENCE IN LEGISLATURES.

Hence, the executive branch of state government is nearly everywhere more vigorous, more influential, and more secure in public confidence today than it was a generation ago. It is unlikely that this movement can be halted and a march begun in the opposite direction. Whatever the logic of the situation, one must face the fact that a distrust in the capacity and in the integrity of legislatures is prevalent in many quarters. Proposals to widen the powers of the state legislature seem to find little support anywhere; while plans for expanding the powers of the governor seem to command popular approval.

Note, for example, the way in which the movement for budget reform is taking from the legislature its initiative in finance and giving this to the executive, both in national and in state government. There are astonishingly few people (even among the legislators themselves) who look upon the state legislature with undiluted admiration. This is partly because so many low-voltage politicians manage to get themselves elected to these bodies, and partly because the problems of state government have become so exacting that they can no longer be competently handled by unwieldy groups of lawmakers, no matter how competent the individual members may be. Even if every Athenian citizen had been a Socrates, the Athenian system of government by mass meeting could never have been a real success.

SHOULD WE REDUCE THE STATE LEGISLATURE TO A SINGLE CHAMBER?

Would the situation be improved by abolishing the bicameral system and replacing it with a one-house legislature of relatively small size? That is what Nebraska did in 1937. Comment on the nature of this change and on the still somewhat tentative results have been made on a previous page.[1] Undoubtedly a single chamber concentrates responsibility for

[1] See p. 643.

lawmaking and operates with greater speed. Possibly it will act with too great speed and enact poorly conceived and ill-considered legislation: but the governor's veto and sometimes the popular referendum provide safeguards. Other states may follow Nebraska's lead although as yet none of them has done so and our political traditions are all against it. When a country has maintained any governmental institution for over a hundred and fifty years, the difficulties of abolishing it are by no means inconsiderable. Add to this the fact that the rural areas have been able, in many cases, to secure overrepresentation under the two-house system and will resist an attempt to make them give it up. Still, we have seen a lot of old American institutions go by the board during the past fifty years — the ward caucus and the anti-third-term tradition, the silk hat and the minstrel show, the torchlight procession and the five-cent cigar, the livery stable and the low tariff. Perhaps the next generation will see the bicameral legislature headed for the junk yard. But only a courageous man would venture to predict that outcome.

THE OBSTACLES.

But a more urgent problem in the government of the American states than the status and powers of the governor or the size of the legislature relates to the machinery by which the vast and varied administrative work of the state is being carried on. This machinery, as has been shown, is extensive and complicated, being composed of departments, boards, bureaus, sections of bureaus, and offices by the score. It has been built up without plan or set purpose. In scarcely a state of the Union does the scheme of administrative organization conform to the simplest requirements of unity and cooperation. It embraces, for the most part, a group of disjointed authorities, with the lines of responsibility running in all directions, with powers which are ill-defined and functions which overlap, and with almost no means of working in unison. The situation in many states continues today just as it was thirty years ago, when a distinguished New Yorker spoke of the numberless "outlying administrative agencies, big and little, lying around loose, accountable to nobody, spending all the money they can get, and violating every principle of economy, of efficiency, and of the proper transaction of business." [1]

THE NEED FOR ADMINISTRATIVE REFORM.

The simplifying of state administrative machinery has been repeatedly urged by governors in all parts of the country during the last two decades. Their annual messages have had more to say on this than on almost any other topic. Legislatures have responded by appointing com-

PROPOSALS AND PROGRESS IN THIS DIRECTION DURING RECENT YEARS.

[1] Speech of the Hon. Elihu Root in the New York Constitutional Convention of 1915.

mittees to study the question, but there the matter has too often ended.

THE OBSTACLES WHICH HAVE BEEN ENCOUNTERED: 1. CONSTITUTIONAL BARRIERS.

One reason for this is to be found in the fact that projects of administrative reform usually require changes in the state constitution, and it is difficult to make the masses of the voters understand so complicated a matter as a general revamping of administrative machinery.

Apart from this difficulty, moreover, the legislatures have been slow to act. Most legislators do not develop much enthusiasm over any plan that proposes to abolish jobs, reduce the state pay roll, and eliminate patronage. Opposition to the radical consolidation of existing administrative departments comes also, and quite naturally, from the officials of these departments themselves, a considerable proportion of whom are, or have been, prominent party leaders. Their influence with the legislature, when they oppose reform unitedly, is very great; and, in many of the states, it has proved to be the chief practical hindrance to any plan of administrative reconstruction.

2. OPPOSITION OF STATE OFFICIALS.

Nevertheless, considerable activity in the direction of reorganizing state administrative structures was witnessed during the period between the two World Wars, more than half of the states having undertaken to authorize changes either by statute or by constitutional amendment. These reorganizations varied considerably in scope and effectiveness. Some of them, in fact, might more properly be described as a reshuffling of administrative agencies than a thorough overhauling of the whole administrative structure. In every instance the professed aim was to consolidate existing agencies. This has usually meant the abolition of some administrative units and the transference of their activities to other agencies. It has also meant that numerous boards and commissions, formerly independent, have lost this independence, and that those in related fields of activity have been merged into a single integrated department under an administrative head directly responsible to the governor. Occasionally, where a board's autonomy has been preserved because it performed quasi-judicial or quasi-legislative functions, it has none the less been formally incorporated into the structure of an administrative department for budgetary and related purposes. Thus, administrative reorganization has sought, first, the consolidation of functions; second, the concentration of supervisory authority by substituting single commissioners for boards or commissions; and third, the unifying of ultimate responsibility for state administration in the hands of officials who are directly responsible to the governor.

WHAT HAS BEEN ACCOMPLISHED.

Certain incidental features of the reform programs may also be men-

tioned. The governor's term has sometimes been lengthened from two to four years, and the terms of all the principal administrative officers have been made to correspond with it, thus avoiding the difficulties caused when a governor comes into office and finds that his chief subordinates are holdovers from a previous administration. As a result of the lengthened term and the transfer of many elective state offices to the appointive class, the ballot has been appreciably shortened in some of the states. Perhaps most important of all is the effort which has been made to improve administrative procedure, particularly in such matters as the awarding of contracts, the purchase of supplies, and the keeping of accounts.

OTHER VALUABLE REFORMS.

One should hasten to make clear that not all plans for state administrative reform have achieved conspicuous success. Some of them were emasculated during their passage through the legislature. In a few states some of the reforms were definitely rejected through fear of unduly strengthening the governor's authority to a point where the legislature's control over administration might be impaired. Some real progress, however, has been made. The ice of traditionalism has been broken, and there is little reason to doubt that any of the states will permanently tolerate a network of administration that shows itself unable to cope with the complex problems of a modern commonwealth. And, in any event, one should remember that machinery is not the only thing. The mechanics of state administration are important, to be sure, for a badly designed setup can often frustrate the best intentions of the best officials; but no administrative mechanism, however streamlined and perfected, can ever turn corrupt or incompetent administrators into honest and efficient ones. That ought to be a self-evident truth, but it is not. There are reformers who still seem to believe that you can make a silken purse out of a sow's ear.

PROSPECTS FOR THE FUTURE.

The growing importance of administration in state government has brought some other problems to the forefront. One of these is related to the steadily increasing volume of rules, orders, and directives, which are fired, like shells from a bazooka, by the various state administrative agencies to which the legislature has given discretionary powers. To all intents and purposes, these rules and orders have the force of law. And often they intimately concern the citizen's liberty or property. Yet they emanate from so many agencies, and are often so inconsistent with one another, that even when the citizen knows what the law is today, he can never be sure what it is tomorrow. Even the agencies themselves do not

THE PROBLEM OF ADMINISTRATIVE RULES AND ORDERS.

always have a complete and accessible record of what they have ordered people to do. A similar difficulty was partly overcome by the national government when it established the *Federal Register* in 1935. This official publication incorporates every new federal administrative order, ruling, or regulation. Taken with the *Code of Federal Regulations*, which contains all the older regulations still in force, we now have an adequate and up-to-date compendium of federal administrative law. The suggestion has been made that each state adopt a similar plan, and two or three of them have done so. Others provide for the prompt publication of some (but not all) of their administrative orders, while still others issue periodical summaries or digests. It would seem to be fairly arguable that when administrative regulations have the force of law, they should be promulgated, published, and indexed, as laws are. The old legal rule that ignorance of the law never excuses a violation of it is still in force; hence the citizen should have a reasonable opportunity of knowing what regulations, with the force of law, he is expected to obey.

THE *Model State Constitution.*

Various comprehensive plans for the entire reconstruction of state government have been advocated from time to time by reform organizations. The most widely known is the plan set forth in the *Model State Constitution*, published by the National Municipal League. Four editions of this model constitution have been published, the latest in 1941. Like the actual constitutions of existing states, this model document grows longer with each revision, the latest edition having one hundred and sixteen sections, whereas the previous edition had ninety-five. It proposes a one-house legislature elected by a system of proportional representation. A legislative council, consisting of the governor and a few members of this one-house legislature, is to assist the latter by collecting information, drafting proposed laws, and making recommendations on any matter of state government. The executive power is concentrated under this plan in a governor elected for a four-year term. He becomes the responsible administrative head of the state. All department heads are appointed by him and removable by him at pleasure. Various agencies are set up to aid the governor in the discharge of his duties, all of them directly responsible to him. A unified state judiciary is recommended, with responsibility for the operation of the courts vested in an elective chief justice, who is assisted by a judicial council. Judges are nominated by this council, appointed by the chief justice, and are then subject to recall by the voters, if the latter demand it. Various other provisions relate to the governor's veto power, the initiative and referendum, the budget, and municipal home rule. The model constitution has been widely discussed, but no state has adopted

it as a whole; nor is any state likely to do so, for some of its provisions represent a too radical departure from what we have come to look upon as the American way of life as applied to state government.

WHY RECONSTRUCTION HAS NOW BECOME MORE URGENT.

Yet the developments of recent years have made the reconstruction of state government more urgent than ever before. The economic depression of the 1930's brought with it a drop in state revenues through a reduction of property values and an increase in tax delinquencies. On the other hand, the expenditures for relief underwent a great and necessary enlargement. This made it imperative to discontinue some existing state functions and often to reduce the salaries of those officials whose remuneration was not fixed by the state constitution. The war and its attendant prosperity improved the financial position of the states, at least temporarily; but with the close of the war, there is bound to be some falling off in revenues as well as an increase in expenditures for necessary public works, which were held up by war-created shortages in material and manpower. The postwar period will doubtless also bring increased state outlays for the welfare of veterans, even though the federal government bears most of this burden. Federal enterprises conducted during the depression and war years, moreover, have encouraged the states to extend their functions with respect to various branches of economic activity by fixing maximum hours of labor and providing a minimum wage, by prohibiting various unfair trade practices, and by embarking upon various schemes of social insurance.

For this excursion into the domain of managed economic life, the existing mechanism of state government is not well fitted, and the urgency of a general overhauling has now become more widely recognized. There is a prevailing belief, both among students of political science and among experienced public administrators, that no mere patchwork reform of state government will avail. If we are to have a steady expansion of state supervision over many forms of private business, as seems to be likely, the whole level of public administrative efficiency must be raised. This will require a replanning which does not stop with the administrative branch of state government but must be carried through the entire structure.

THE CONTINUED NEED FOR CIVIL SERVICE REFORM.

But no attempt to raise public administrative efficiency can make much headway unless a sincere and persistent effort is made to improve the quality of the personnel in the public service. This may be stating a platitude, but the public mind does not seem to sense the fundamental truth that is contained in it. The national government enacted its first civil service law (the

Pendleton Act) in 1883. The states of New York and Massachusetts adopted similar measures about the same time and, after the turn of the century, a few other states, such as Wisconsin, New Jersey, Colorado, Illinois, and California, did likewise. More recently some other states have joined the procession. Nevertheless, more than sixty years after the initiation of civil service reform in the United States, only about twenty states have state-wide merit systems of appointment to positions in the public service. A few others have applied the merit principle to their welfare and social service departments in order to qualify for financial grants under the national Social Security Act. Elsewhere, the principle of political preferment and the spoils system, in unadulterated form, continue to hold sway. Yet no one (other than the spoilsman himself) will question the proposition that places on the state pay roll should be given to those who can do their work competently, rather than to men and women whose only qualification is the favor of some influential politician. The difficulty lies in transforming this proposition from an axiom into an actuality.

LESS HOSTILITY TO THE PARTY SYSTEM.

The party system, as the mother of spoils and patronage, is a vital factor in the actual workings of government and should never be left out of account. Undeniably, it has been responsible for many administrative abuses. But why have we permitted these abuses to develop at the hands of the party system? It is chiefly because the laws have either ignored political parties altogether or have gone after them in a hostile spirit. Rarely have the state laws been framed to recognize, improve, and encourage honest party effort. Lawmakers have not appreciated the fact that political parties are inevitable in a democracy and that the only choice is between compelling them to be helpful or permitting them to be a hindrance.

PARTY ORGANIZATIONS SHOULD BE ENCOURAGED, NOT IGNORED OR REPRESSED.

The time has come, therefore, to make a truce with partyism, to take it into camp as an ally of responsible government, to recognize, legalize, and intelligently encourage it. Constitutions and laws should lend their assistance to the upbuilding of strong political parties with regularized organizations. These organizations should be looked upon as integral factors in actual government (which they are) and dealt with accordingly. They should be given the same measure of friendly consideration with respect to their proper and necessary functions that is accorded to the labor organizations, for example. Constitutions and laws should recognize that parties need leaders and ought to be provided with a rightful way of choosing them. These posts of leadership should be dignified, in keeping with the real power which

they represent, and not treated as representing a species of political usurpation.

THEY SHOULD ALSO BE GIVEN A REASONABLE CHANCE TO RAISE AND SPEND MONEY.

It is also time to recognize that party organizations (like labor organizations) need money, and that they should be provided with convenient and lawful means of obtaining it. In placing limits upon their expenditures, we ought to recognize the fact that the people like to see a real campaign and that a real campaign costs money, usually a good deal of it. In some of the larger states there are two million voters or more. Suppose a political party spends only fifty cents per head (for newspaper and billboard advertising, printing and mailing circulars, holding meetings, radio broadcasting, and getting out the vote on election day), it will have spent a million dollars. At once there will be cries of slush fund, debauching the electorate, buying the governorship. Yet how much educating of the whole people, whether on political issues or in any other field of knowledge, is it possible to do on less than a half dollar per capita? Placing an unreasonably drastic limit on campaign expenditures merely encourages resort to evasions and subterfuges. The money is spent all the same, but in ways which circumvent the letter of the law.

THE BETTER ENLIGHTENMENT OF THE ELECTORATE.

Finally, no program of reconstruction will assure a lasting improvement in the quality of state government if it begins and ends with laws alone. The voter — not the constitution, the governor, the legislature, the administrative system, the party, or the boss — the voter is the fundamental fact in all democratic government. If you want to reconstruct and regenerate, you must begin with him. And the difficulty about reconstructing a voter is that you have to begin with his grandfather, for he has probably inherited his grandfather's political ideas, traditions, whims, and prejudices.

THE MERE RECONSTRUCTION OF MACHINERY WILL NOT AVAIL.

Our reformers, it is to be feared, have been giving the people too many peppered chocolates. Mechanical changes in government, including the initiative and referendum, the recall, direct primaries, short ballots, single-chamber legislatures, legislative councils, proportional representation, the merit system, administrative reorganization, tax limits, modern methods of budget-making, city and county managers, and all the rest, may be helpful as far as they go; but no one of them, or all of them put together, will ever make a genuine democracy out of an indifferent or loose-thinking electorate. The same is true of social and economic reforms when inaugurated by legislative enactment. So long as the masses of the

voters remain befuddled as to the real issues at stake, so long as they are unable to discriminate between everyday facts and utopian futilities, so long as they respond to every claptrap appeal that comes to them out of the ether — just so long will we have government marked by confusion, emotionalism, class warfare, and wastefulness.

EPILOGUE.

A convenient formula for disposing of this fundamental problem is the assurance that education can and will ultimately provide the remedy. Perhaps it can and will, but as yet it has shown no convincing signs of doing so. Education and clarity of thought do not seem to be twin sisters, nor does education necessarily render its beneficiary impervious to political skulduggery. On the other hand, we have by no means exhausted our possibilities in the way of civic enlightenment through agencies of public education. It is difficult to believe that the schools and colleges of the United States cannot render a greater service towards the upbuilding of a more sophisticated electorate. By what processes of instruction can they most effectively do it? That is a question for educators rather than for students of government.

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CHAPTER XLVI

THE GOVERNMENT OF CITIES

To make the city is what we are here for. He who makes the city makes the world. For whether our national life is great or mean depends on the city. — *Henry Drummond.*

Considerably more than half the people of the United States now live in the cities and towns. Hence, it is in these urban communities that most of the people's government is being carried on. The greater part of the nation's leadership in business, in art and literature, in science, in education, in philanthropy, and even in statesmanship, comes from the cities. Most of the propaganda for every cause or movement originates there. The influence of the city upon the national life is far greater than the figures of urban population imply. A nation is known by the cities that it builds.

IMPORTANCE OF THE CITY.

The development of these urban communities has been the most striking social phenomenon of the past hundred years. The United States, in 1835, had only twenty places of eight thousand inhabitants or more, and they contained less than seven per cent of the country's total population. In 1935, a century later, there were over twelve hundred such communities and they contained more people than were left in all the rural regions of the country put together. During the next ten years a further migration from these rural areas took place, especially into the centers of war industry. But whether in war or in peace, there are no indications that the cities are likely to stop growing. Depressions do not seem to be successful in sending the people back to the farms. It seems probable, therefore, that the cities of the United States will eventually contain three fourths of the national population, perhaps more. This means that the problem of maintaining high standards of city government is likely to become even more important and more difficult in the future than it has been in the past.

A CENTURY OF CITY GROWTH.

To govern a large city well is more difficult than to provide a rural district with good administration. This is because the two areas are different in many ways — in their social structure, their point of view, and their problems. For one thing, the occupations of the people in a city are more diversified, with

THE CITY AS A SOCIAL UNIT.

no bond of common vocation holding them together as in a rural community. Division of labor is carried to an extreme in the large cities, and this high degree of specialization tends to narrow the horizon of the worker. It develops expertness in doing some one thing, with a dependence upon others for everything else. The city dweller looks for professional guidance in work and play — even in politics. He leads a life so crowded with impressions that no time is left for reflection. Agriculture is seasonal, with interludes of leisure; but the toilers in industry and commerce pursue their daily grind six days a week throughout the year. This is particularly true of the great masses of foreign-born in the larger cities. It is said of New York City, and doubtless with truth, that it contains "more Irishmen than Dublin, more Italians than Padua, more Germans than Potsdam, and more Jews than Jerusalem." Other large cities have similarly diversified racial mixtures. It is difficult to create any fixed political traditions in such polyglot communities.

TRAITS OF ITS POPULATION.

In many other respects, a city differs from a rural area of equal population.[1] It has a higher birth rate, a higher death rate, and a higher ratio in the statistics of crime. It has relatively fewer illiterates, strange to say, despite its larger proportions of aliens. The people of the city earn more per person and spend more than those of rural sections. They preserve, as military statistics have shown, a substantial equality with the rural population in point of good physique and the absence of serious bodily defects. The city, on the other hand, is a place where extremes meet. Wealth and poverty, culture and ignorance, virtue and vice, are brought into close proximity. There is an East Side and a West Side, only a few blocks apart — but for all the one knows about the other, they might be in different continents.

OTHER URBAN TRAITS.

THE LEGAL POSITION OF CITIES

The city is a municipal corporation. As such it has some of the characteristics of a private corporation, to which it is historically closely related. But the resemblance to a private corporation should not be pressed too far, for the municipal corporation is created for public and not for private ends. Its aim is to provide for the general welfare of the citizens, not to make profits and dividends for stockholders. Moreover, since it is the creature of the state, it

THE CITY IS A PUBLIC CORPORATION.

[1] Books which deal fully with this topic are J. G. Thompson, *Urbanization* (New York, 1927); Nels Anderson and E. C. Lindeman, *Urban Sociology* (New York, 1928); M. R. Davie, *Problems of City Life* (New York, 1932); N. P. Gist and L. A. Halbert, *Urban Society* (New York, 1933); and Niles Carpenter, *The Sociology of City Life* (New York, 1932).

enjoys none of the special protections which are vouchsafed to the property and other rights of private corporations by the bills of rights of national and state constitutions.

THE CHARTER AND WHAT IT CONTAINS.

The basis of the city's legal existence and of its internal government is a document known as the city charter. This document, as a rule, begins with a statement of the city's boundaries and then declares the city to be a municipal corporation with corporate powers — the right to sue and be sued, to own property, to make contracts, etc. Next it stipulates what form of government the city shall have. It describes the basic structure of this government, lists the officers the city shall have, how they shall be chosen and for how long, how they may be removed, and, sometimes, what salaries shall be paid them. It sets forth, also, the powers and duties of these various officials. Finally, there are many miscellaneous provisions relating to such matters as awarding contracts, budget-making, auditing accounts, and purchasing supplies. Some charters have provisions relating to the initiative, referendum, and recall; a few provide for proportional representation. A charter may contain only general provisions or it may include a large mass of detail. The tendency, however, is to make charters too long. And the more prolix a charter, the more basis there is for controversies and litigation. The greater the elaboration of details, the greater is the temptation to circumvent and evade.

HOW CHARTERS ARE GRANTED.

All city charters emanate from the state legislature which, in the absence of specific constitutional restrictions to the contrary, exercises complete discretion in formulating this document. But legislatures may be, and nowadays are, restricted by provisions of the state constitution as to the degree in which they may exercise control over cities, and particularly as to the manner in which city charters are granted. In some states, each city receives from the legislature a special charter which may not resemble that of any other city; in others, the same type of charter is granted to all cities of approximately the same size; in still others, the legislature provides several alternative charters and allows each city a choice among these alternatives. In a fourth group of states, there has been what is known as a home-rule charter system under which the legislature permits each city (within certain limitations) to frame its own charter.

This home-rule charter system, which is now available either to some or to all of the cities in seventeen states, deserves a word of explanation.[1]

[1] For a complete discussion see Howard L. McBain, *The Law and the Practice of Municipal Home Rule* (New York, 1916), which is supplemented by Joseph D. McGoldrick, *The Law and Practice of Municipal Home Rule, 1916–1930* (New York, 1933).

As its name implies, it is a plan whereby cities make their own charters just as states make their own constitutions. Usually the drafting of the home-rule charter is entrusted to a body of citizens known as a board of freeholders or charter commission, elected by popular vote. When the board has completed its work, the charter is submitted to the people of the city at a general or special election. If it is approved by a majority of the voters, it goes to the legislature which gives the charter its final enactment.[1] Individual amendments to home-rule charters are ordinarily initiated by petition and adopted by the voters in the same way.

THE HOME-RULE SYSTEM.

In actual practice, however, the home-rule charter system does not grant the city as much local freedom as this brief description might indicate. The cities, in making their own charters, are restricted to matters of *local concern* and (quite properly) are not permitted to deal with matters of state-wide interest. But what are matters of local concern? The line of demarcation between municipal affairs on the one hand and matters of state-wide importance on the other is not firmly fixed, and this gives rise to much controversy. The courts, for example, have ruled that state affairs include such matters as assessment, taxation, elections, police, licenses, education, public health, and poor relief, which at first glance might be deemed to be matters of municipal jurisdiction. The provisions of home-rule charters must keep within the bounds of the general state laws on these and many other matters. Municipal home rule does not mean, therefore, that each city can set up a little rock-ribbed republic, but merely that it may choose for itself the general outlines of its own government and that it shall be free from state interference within that rather limited area which is usually designated as the field of "strictly municipal affairs."

LIMITATIONS OF THE HOME-RULE SYSTEM.

Notwithstanding these limitations, however, the home-rule charter system has some tangible advantages. It relieves the legislature from having to do with a multitude of local matters at every session, thus affording more time for the consideration of state-wide problems. Under the special charter system, it has been found that municipal affairs frequently consume from one fifth to one fourth of a legislature's time. The home-rule system also helps to divorce state from municipal politics, and it has also proved an agency of political education, encouraging the voters of the city to take an active interest in

ITS MERITS.

[1] In Arizona and Oklahoma, however, it goes first to the governor, who may withhold his signature if he finds the charter in conflict with the state constitution or laws. In California, it goes to the legislature, which may accept or reject a home-rule charter, but may not alter it. But neither governors nor legislatures are in the habit of interfering with home-rule charters after they have been adopted by the people of the cities concerned.

the form and functions of their local government. When things go wrong, they cannot blame the state legislature, as they always do when there is interference from outside. But its greatest advantage lies in the fact that, under the home-rule plan, a city gets a frame of government which suits its own special needs. It obtains the sort of charter its people desire, provided, of course, that their desires do not run counter to the general interests of the state as a whole. Something may also be said for the home-rule system as a promoter of new experiments in city government, for it is only by giving new methods a trial that we can ascertain their value.

THE CONTROLS EXERTED OVER CITIES.

Within the provisions of its charter, the American municipality exercises considerable autonomy. But to the extent that it is not restricted by the constitution, the legislature of the state may, and often does, pass laws relating to all cities or to individual cities. At times there are differences of opinion as to whether a matter is one of "local concern," over which the city exercises full control, or whether it is one of "general concern" and, hence, subject to the intervention of the state legislature. In such cases, the courts are called upon to settle the disagreement. Sometimes they find this difficult to do, because the existence of numerous cities in the same areas, with their boundaries touching one another, renders it impractical to look upon each of them as miniature sovereignties.

Nevertheless, the American tradition is that local government should be, in the main, government by the locality, and when there is doubt, the courts have been disposed to give the city the benefit of it. In this respect the American tradition differs from that which exists in the countries of Continental Europe or even in Great Britain, where a great deal of centralized administrative control is exerted over municipal activities. In other words, the exercise of discretionary powers by a municipality in those countries is more or less regularly subject to review by some administrative branch of the central government. It is only right to add, however, that this administrative supervision over municipal affairs is also growing in the United States. A considerable variety of municipal functions, for example, those relating to health, education, welfare, public works, and the auditing of municipal accounts, are now being subjected to the scrutiny or supervision of state administrative agencies. And the likelihood is that this type of control will increase in the future. It is part of a general tendency throughout the whole system of American government.

In a strictly constitutional sense, the national government has nothing to do with the administration of the cities, this being a matter which falls

exclusively within the province of the state governments. But recent developments, arising particularly out of the economic depression of the 1930's, have brought about a good deal of informal connection between the municipalities of the country and the government at Washington. The latter has assisted cities financially in slum clearance and low-cost housing projects, in constructing public works, and in permitting them to borrow money from federal agencies such as the reconstruction finance corporation. The national government has also attempted to improve municipal credit by appropriate bankruptcy legislation, which has enabled cities to make terms with their creditors, and in a great variety of ways it has assisted the cities in providing relief to citizens in distress. In these things, the agencies of the national government have in some cases adopted the practice of by-passing the states and dealing with the city authorities directly, which is something that was not common in earlier days.

CITIES AND THE FEDERAL GOVERNMENT.

Various forms of government are established in cities by their charters, but they may all be grouped under three headings: namely, the mayor-and-council plan, the commission plan, and the city manager plan. The first is the oldest. It has existed in some American cities ever since colonial days. Originally, the city council consisted of two chambers, usually known as the board of aldermen and the common council; but this bicameral system has been generally abolished. In most of the larger and medium-sized cities, this simplified mayor-and-council plan continues to hold sway, while the other two types of municipal government have made their chief progress in the smaller communities.

THE THREE GENERAL TYPES OF CITY GOVERNMENT.

MAYOR-AND-COUNCIL GOVERNMENT

Mayor-and-council government is based, in a general way, on the analogy of state and national government. A mayor, directly elected by the people, and a body of administrative heads perform the executive functions of city government. They are independent of the city council to the same extent that the governor is independent of the state legislature. The council, also elected by the voters, is endowed with legislative, or policy-determining, authority. It is supposed to have no executive functions, but frequently has a share in deciding such matters as the granting of franchises to public utility companies and occasionally it appoints certain municipal officers such as the city clerk and treasurer.

GENERAL PRINCIPLES OF MAYOR-AND-COUNCIL GOVERNMENT.

Frequently a distinction is made between "weak" and "strong"

mayor-council governments. The difference is largely one of degree. The system is said to be "weak" if administration is decentralized and largely beyond the control of the mayor; that is, if the heads of administrative agencies are largely elective; or if their appointment and removal by the mayor requires the assent of the council; if the mayor lacks power to initiate budgetary and fiscal policies; and if his veto power over the council is merely suspensory. On the other hand, the system is said to be "strong" if the mayor is legally the dominant, or tends to be the dominant, figure. His dominance is distinguished by the fact that administration is centralized in various department heads who are appointed by him, usually without council confirmation, and who hold office during the mayor's pleasure. It is distinguished further by the mayor's primary authority in financial matters, especially with reference to the city's expenditures. Somewhat over half of America's cities (urban centers having populations of five thousand or more) have the mayor-council plan of government; and many of these plans, probably a majority, would be classified as "weak." The trend, however, has been towards the "strong" plan, with increased power for the mayor. When city charters are revised, the tendency is still in that direction.

"WEAK" AND "STRONG" TYPES.

The mayor's term is either two or four years in most cities, the former being customary in nearly all but the largest ones. Usually a mayor may be chosen for a second term; but in a few cities this is not permitted. The office carries a salary which varies from a few hundred dollars in some of the smallest cities to twenty-five thousand in New York. Elections are usually on a partisan basis, although in some cities a nonpartisan ballot is used. The mayoralty of a large city ought to be a stepping-stone to a higher office in the state or nation, but rarely has it proved to be such. Relatively few mayors of large cities have ever gone any higher in the political scale. New York City, for example, has had some colorful mayors, but not one of them in more than a hundred years succeeded in reaching the governor's post at Albany.

THE MAYOR.

According to the theory of the mayor-and-council plan, the mayor has no share in legislation, that is, in making the city ordinances. But he may send recommendations to the city council and may veto any ordinance which he disapproves, hence his actual influence upon municipal legislation is considerable. Recommendations to the city council are sent in written communications which are read by the council's clerk and then referred to the appropriate committees. Whether they will be

HIS POWERS: 1. RECOMMENDATIONS TO THE CITY COUNCIL.

adopted depends to a large extent upon the political relations which exist between the two branches of the city's government. The mayor is usually a local party leader, and if his party controls a majority in the council, the chances of favorable action by the latter are naturally much greater than when the political situation is otherwise.

2. THE VETO.

Most city charters operating under the mayor-council plan provide that any ordinance or resolution which passes the city council shall be sent to the mayor for his approval. If the mayor approves the measure, he signs it; if he does not approve, he may return it unsigned within a designated number of days and state his reasons for disapproval. The council may then pass the ordinance over the mayor's disapproval, or veto, by a two-thirds vote. In a few cities the requirement is a three-fourths vote. There is also, in most cases, a provision that if the mayor neither signs nor returns a proposed ordinance within the prescribed time, it becomes valid without his signature. The general resemblance between the veto power in federal and in municipal government is thus plainly recognizable. Its merits and defects, moreover, are pretty much the same in both these fields.[1]

3. APPOINTMENTS.

The higher officials of city administration, such as the auditor, city attorney, police commissioner, superintendent of streets, together with the members of the various boards and commissions, are usually appointed by the mayor; but in many cities there is a requirement that appointments made by the mayor to these higher administrative positions must have the concurrence of the city council (or the upper branch of that body) before they become valid. This requirement of confirmation is another example of the influence of the federal system upon local government. In the cities its merits are open to question, for while the plan has at times served to prevent the making of improper appointments, it has more often divided the responsibility between the mayor and the council to such an extent that the people are not able to hold either of them to a strict accountability. Accordingly, some of the larger communities (New York and Boston, for example) have abolished the system of council confirmation. Others (including Chicago, Philadelphia, St. Louis, and Los Angeles) retain it.

4. REMOVALS.

The President of the United States may remove national executive officials without the consent of the Senate; but in this respect, with a few notable exceptions, cities have not followed the national example. In many instances, the city charters stipulate that removals may not be made by the mayor unless the council concurs. Here again an opportunity is afforded for the evasion of responsibility. It is

[1] See pp. 174 *ff.*

desirable that the power of removal should be vested in the mayor alone, and some city charters have so arranged it. Where the appointments have been made under civil service rules, however, it is proper to provide that removals shall not be made except on definite charges and after a public hearing.

5. FINANCIAL POWERS.

Another group of mayoral powers relate to financial administration. These powers differ greatly in extent from city to city, but the tendency everywhere is towards their enlargement. In some cities, the mayor is given the sole right to initiate proposals of expenditure, the council being allowed to reduce any item in the mayor's list of estimates but not to increase or to insert new items. And, on the whole, it seems desirable that the function of preparing the city's annual budget should be given to the mayor, thus placing the onus for extravagance in a definite spot — when extravagance occurs. When the budget is prepared by the city council, every member is mainly concerned with getting all he can get for his own ward or district. His chief desire is to dip out as much gravy as he can without soiling the tablecloth.

6. MISCELLANEOUS.

Some miscellaneous powers also pertain to the mayor's office. He has the right to investigate the work of the municipal departments; sometimes his approval is required when contracts for public works are awarded; and not infrequently he has the powers of a justice of the peace or local magistrate. The mayor represents the city on all occasions of ceremony and ranks as the first citizen of the community. Sometimes he may pardon offenders who are convicted of violating municipal ordinances. Social duties, which are of infinite variety, take a large share of his time and energy, so much so that personal attention to the details of his official work has become exceedingly difficult in the larger cities. He is expected to receive and welcome all distinguished visitors who come to the city; he is asked to give an official greeting to conventions of every sort, to attend banquets of the chamber of commerce, to lead the grand march at the Knights of Columbus ball — his calendar each day is cluttered with such things. Some years ago, the mayor of New York appointed an "official greeter," as he was popularly called, to take most of this job off his shoulders.

THE HEADS OF CITY DEPARTMENTS.

The mayor is assisted in his administrative work by various heads of departments and boards. These are given immediate charge of such activities as police and fire protection, streets, parks, water supply, and public health. For a long time it was customary to place a board at the head of each department. This was partly due to a prejudice against giving too much power to any one officer, and partly because a board of three or five members

provided an opportunity to have both political parties represented on it. But the bipartisan board rarely proved to be an efficient body, and it has now been generally supplanted by a single commissioner. The board system has some merits when applied to such departments as poor relief, schools, city planning, or public libraries — in other words, where deliberation and discussion are needed. But in other city departments (such as police, fire, and health protection), where quickness of decision and firmness in action are essential, the board system is unsuitable and should give way to administration by a single head. These heads of departments should be appointed by the mayor and removable by him at will. They, in turn, should select their own subordinates and assign duties to them under arrangements which will be explained in the next chapter.

THE CITY COUNCIL: ITS ORGANIZATION.

Then there is the city council. Originally, it was the chief governing organ of the city, but it has long since lost this place. The council now consists of a single chamber, except in a very few cities. The members are elected for terms of from one to four years. The election is either by wards, or by the voters at large, or by some combination of these two plans. Nominations are usually made by means of a primary. In a few cities, the members of the council are nominated by a petition and elected according to a system of proportional representation.[1]

WARD AND GENERAL TICKET SYSTEMS OF ELECTION.

The relative merits of the ward and at-large methods of electing councilors have been the theme of much controversy. The ward system is the older plan and at one time was practically universal. But it was regarded as responsible for the mediocre quality of the men chosen to city councils, especially in the large municipalities, and for the zeal with which every councilor sought to obtain favors for his own district without much regard for the interests of the city as a whole. The ward system has accordingly been supplanted in many cities by the plan of election at large. The practical difficulty with this latter method, however, is that some districts of the city are likely to be left unrepresented altogether. Moreover, if elections are conducted on a party basis, as is often the case, the majority party will elect its entire slate of candidates, leaving the minority with no councilmen at all. A third objection is found in the time and money which candidates must spend in making a city-wide campaign. To overcome these practical objections, some cities have adopted a combination of the two plans, electing one councilor from each ward and also a designated number at large. If a city has nine wards and a council of

[1] See p. 772.

fifteen members, for example, each voter marks his ballot for seven members, one to represent his own ward and six to be chosen at large. This plan assures some geographical representation and some measure of minority representation as well.

City councils hold regular meetings, usually once a week, and are generally empowered to select their own presiding officers. They also make their own rules of procedure, which are similar to those used in state legislatures, although much less elaborate. Most of a city council's work is done by committees, the members of which are appointed by the presiding officer. These committees examine the various matters which come before the council; they hold public hearings, and make recommendations, which may or may not be accepted.

PROCEDURE.

Chief among the functions of a city council is that of passing ordinances or local laws. These ordinances relate to a wide variety of matters, the protection of life and property, traffic in the streets, sanitation, health, housing, building regulations, zoning, weights and measures, billboards, places of amusement, etc. They must not, however, be inconsistent with the provisions of the city charter or any other state law. Ordinances must be enacted with due regard for the prescribed formalities and must in most cases receive the approval of the mayor before they go into effect. But when properly enacted they are enforceable by the regular courts.

FUNCTIONS OF THE CITY COUNCIL:

1. THE ENACTING OF ORDINANCES.

City councils also possess various powers in relation to local finance. No taxes can be levied, no appropriations made, and no money borrowed except with the council's approval. It is true that the nature of taxes is determined by the state laws, but the city council fixes the tax rate by ordinance. The list of appropriations, too, is often prepared by the mayor, but no appropriation becomes effective until the city council has given its approval. Thus, it has the ultimate budgeting power, subject to the mayor's veto. And in the matter of municipal borrowing the council determines the amount, the term of the loan, and the rate of interest to be paid. In many cities municipal borrowing by the issue of bonds requires also a majority vote of the people at the polls.

2. FINANCIAL AUTHORITY.

In most cities the council retains the power to grant franchises to public service corporations such as lighting, telephone, and street railway companies. In former times, it had complete authority over such matters, but unfortunately abused its trust. Franchises were often given for long periods, and sometimes in perpetuity, without securing adequate compensation for the city. This was

3. POWERS IN RELATION TO FRANCHISES.

done as the outcome of malodorous bargains between councilors and the public utility owners. The state legislatures accordingly stepped in and restricted the council's power by providing that no franchise may be granted for more than a certain term of years and that all companies which receive such privileges shall be subject to regulation by state commissions.

4. MISCELLANEOUS POWERS.

Finally, a city council possesses some powers of a miscellaneous nature which cannot be readily classified. They include such matters as authorizing the purchase of land for public buildings, deciding the location and naming of new streets, the approval of certain important contracts, the adjustment of salaries and pensions for public officials, the fixing of water rates, and the acceptance or rejection of permissive state legislation, in other words, of laws which are passed by the legislature with a provision that they will go into effect in any city when the city council accepts them.

PLACE OF THE CITY COUNCIL IN AMERICAN GOVERNMENT.

This brief survey of the council's powers may seem to indicate that they are of considerable scope, but they are not so important in actuality as they appear on paper. The council continues to be the chief legislative organ of the city; but municipal government is not largely a matter of legislation. It has become, for the most part, administrative in character. Building and repairing streets, providing police and fire protection, erecting public works, guarding the public health, providing public recreation, supplying water, relieving the unemployed — these are the chief functions of city government today. As previously indicated, the drift of municipal development in the mayor-and-council cities, therefore, is towards a subordination of the legislative to the administrative branch of the government. City councils have become less consequential, while the mayor and the heads of departments have been steadily gaining in power.

THE CHIEF DEFECT OF THE AMERICAN MUNICIPAL SYSTEM.

The chief defect of the mayor-and-council type of city government, surveying it as a whole, has been its emphasis upon the principle of checks and balances. This has divided authority between the two branches of local government. The endeavor to model the political organization of the city upon that of the federal government was unwise in its day, and has proved to be unfortunate in its consequences. It has resulted in placing upon the cities a governmental mechanism which is clumsy and slow moving, productive of needless friction, and ill-adapted for the work which a modern city is expected to do for its people. What a city requires nowadays is a simple framework of government that will enable it to do

business as business is done in a twentieth-century world, which means that the power of quick decision must be given to one man or one body of men and not divided between them. Some cities have been trying to gain this end by abolishing the mayor-and-council plan, replacing it with another type of government which provides for a better concentration of power and responsibility. This is known as the commission plan.

THE COMMISSION PLAN

ORIGIN AND SPREAD.

The commission plan of city government originated in Galveston about forty-five years ago. As the result of inundation by a tidal wave, which destroyed a great deal of municipal property and left thousands of the citizens unable to pay their taxes, Galveston was forced to the verge of bankruptcy. In this emergency, the Texas legislature passed a law abolishing the existing mayor-and-council government and set up a small commission of five members in its place. To the commission was given all legislative and executive authority combined. No one anticipated that the new plan of government would be permanent. It was regarded as a sort of municipal receivership. But it proved so successful in its restoration of the city that it has been retained there ever since. Meanwhile, many other cities, in various parts of the country, took their cue from Galveston and set up municipal governments of the commission type. Most of these, however, are relatively small communities, although the list also includes a number of large ones, notably New Orleans, Jersey City, Newark, St. Paul, Birmingham, Omaha, and Portland (Oregon).

ESSENTIAL FEATURES OF THE COMMISSION PLAN.

The essential feature of the commission plan is a board of five commissioners chosen by the people. The commissioners are elected at large for a term of two or four years and are usually paid for their services. One of the five commissioners serves as chairman of the commission and is customarily given the title of chairman or mayor.[1] According to the original commission plan, the chairman or mayor was given no veto power and no authority to make appointments; his duties were to preside at meetings of the commission and to keep an eye on the general course of the administration, nothing more. This arrangement has not been strictly followed by other cities, some of which give the mayor additional powers.

In any event, each commissioner (usually including the mayor) takes

[1] It was originally intended that the commissioners, after their election, should choose one of their own members as chairman or mayor. The more common practice now is to have the people choose the mayor directly.

charge of a group of administrative functions. As there are only five commissioners, there can be only five departments or groups of departments, no matter how numerous and varied the city administrative activities may be. The usual grouping is somewhat as follows: public works, public health, public safety, and two other groups which may be either accounts and finance, public affairs, public property, public utilities, or public welfare. Various combinations of functions are possible. The apportionment of duties among the commissioners may be done in any one of three ways: namely, by the direct election of commissioners to specific commissionerships, by vote of the commission, or by the mayor. The second plan is the one most commonly used.

HOW ADMINISTRATIVE WORK IS DISTRIBUTED.

What are the advantages and disadvantages of this system? The most obvious merit of the commission plan is its simplicity. It eliminates the diffusion of power and responsibility which the mayor-and-council type of city government has often carried to an absurd extreme. There is but one governing authority — the commission; all municipal powers are exercised by it alone.[1] That, of course, has enabled the commission to set new standards of harmony, promptness, and publicity in municipal business. A very sagacious man once said that "in a multitude of counsellors there is wisdom"; but it was not city councilors that he had in mind. A multitude of councilors and other officials, each sharing in the determination of municipal policy, is a far better guarantee of bickerings and inaction than of collective wisdom. Five men can work in harmony where fifty cannot. And it is easier to get better men into posts of responsibility when the number of elective offices is reduced to a very few.

MERITS OF THE PLAN.

On the other hand, the commission plan has disclosed some serious defects, and it is because of these that few converts to the plan have been made in recent years. A body of five commissioners, it has been found, is too small to be adequately representative as a municipal legislature. Moreover, it is too large to be efficient as a municipal executive. In trying to be both it sometimes succeeds in being neither. It is a five-headed executive, a pyramid without an apex. Hence, it has the customary handicap of board government in that it tends to become a house divided within itself. Plural executives rarely give satisfaction; they have shown their weakness in county government everywhere.

ITS SHORTCOMINGS.

Another practical objection to the commission plan is that it discour-

[1] An exception is usually made in the case of schools, which remain in the hands of a separate board.

ages the placing of capable and experienced officials at the head of the various city departments. Each commissioner, as has been said, insists on assuming direct responsibility for a share of the city's administrative work. Just why a commissioner, who is almost always an amateur and unversed in administration, should do this is somewhat difficult to fathom. In England, where nominal responsibility for the discharge of administrative functions is regularly confided to amateur committees of the borough council, the councilmen rarely if ever seek to discharge the responsibility directly. They hire administrative experts for this work and merely exert general supervision. One reason, perhaps, is that the average American still feels that public administration is an art which any able-bodied citizen can quickly master. This notion harks back to the days of Andrew Jackson and his policy of rotation in office; but in spite of a century of experience to the contrary, it is still difficult to make the mass of the voters believe that specialized administrative competence does not always, or even usually, go with vote-getting ability.

There is another reason. Most commission-governed cities cannot afford to pay two salaries for the same work, one salary to an elective commissioner of public health, for example, and another to a qualified health expert. Members of the commission, accordingly, are tempted to go beyond their depth and handle health problems which are beyond the competence of laymen. No one can be divested of his strictly amateur status by merely calling him commissioner of public works, or giving him some such high-sounding title. There is no reason, of course, why the pursuit of any honest occupation should debar a man from service as a *representative*, but to be a successful administrator in the technical branches of municipal business (such as water supply or street construction), one must possess something more than common honesty and good intentions.

THE FUTURE OF THE COMMISSION PLAN.

In view of the organic shortcomings which the commission plan has disclosed in actual operation, it is unlikely that American cities, especially the larger ones, will find emancipation from their difficulties by adopting it. Many small communities will doubtless retain it, but such places can get along with any form of government provided it is simple. Among the larger cities it is not probable that the commission form of government will do more than hold its own. For it is weak at the very point where government must be strong in order to help solve those complicated problems which confront the larger urban communities of today. Let it not be concluded from this, however, that the commission movement has failed to render a great service to the cause of better municipal government. Its rise embodied a protest against an old order, and compelled American cities,

both big and little, to clean house. It set things going in the right direction, and they are still headed that way.

THE CITY MANAGER PLAN

A NEWER DEVELOPMENT.

The two fundamental defects of commission government, as indicated in the foregoing paragraphs (namely, its failure to make provision for a unified central control over the entire administrative work of the city, and its practice of putting the various city departments under the supervision of men who have no technical qualifications), made it necessary to devise some arrangement which would overcome this inherent weakness. So municipal reformers turned to the analogy of the business corporation and decided that instead of having the five commissioners divide the work of administration among themselves, they ought to "hire a manager" to do it for them, just as the directors of a railroad or factory are in the habit of doing. In that way the city government would be able to unify its administrative functions without having any division of ultimate authority. The commission (or city council) would retain final power in all things, but it would delegate all administrative responsibility to a manager, chosen by itself and acting as its agent.

ITS ORIGIN AND SPREAD.

The first large city to try the manager plan was Dayton, Ohio, which inaugurated the new system in 1914. Presently it spread to other cities and, after a lapse of thirty years, the plan seems to have lost little of its popularity. True, Cleveland, Ohio, the largest manager-governed city, abandoned the plan after a trial of about a decade; and two dozen or so smaller communities have likewise discontinued the plan. But new converts are being added to the list of manager-governed cities, which now totals more than five hundred communities. Most of these, it is true, are cities of less than ten thousand people; nevertheless, the list includes a number of large urban centers such as Cincinnati, Kansas City, Rochester, Toledo, Miami, Oakland, Fort Worth, Dallas, Cambridge, Dayton, Yonkers, Grand Rapids, and San Diego.[1]

ITS ESSENTIAL FEATURES: THE COUNCIL.

What are the outstanding features of the manager plan? First, there is a commission or council, usually consisting of from five to nine members, elected by the voters of the city, sometimes by a system of proportional representation.[2] This constitutes

[1] Discussions of the city manager plan, with references to additional material, may be found in the books which are listed at the close of this chapter.

[2] This system may be explained as follows: the names of all candidates are printed alphabetically on the ballot and the voter indicates his choices by marking the figure 1 after the name

a "policy-determining body." It enacts the ordinances, makes the appropriations, authorizes borrowing, grants franchises, and decides all general questions. But it does not assume any direct share in the administrative work of government. Instead it appoints an official known as the city manager and devolves this work upon him. In other words, the council hires a general manager for the municipal corporation.

FUNCTIONS OF THE CITY MANAGER.

The functions of the city manager may be grouped under four heads. First, he is the council's advisory expert on all questions of municipal policy. He attends its meetings, takes part in the discussions (but does not vote), and provides the commissioners with such data as they may need for reaching decisions. He is the connecting link between the legislative and administrative departments of the city government. Second, the city manager is the council's agent for enforcing the ordinances and carrying its votes into effect. In this respect he inherits a function which belongs to the mayor in the mayor-and-council cities. Third, he has the right to appoint and remove all municipal officials,[1] subject, of course, to the civil service regulations wherever these are in operation. These regulations usually give the city manager a free hand in selecting the heads of the various departments (such as streets, parks, police, etc.) but require that appointees to all subordinate positions shall be taken from the lists supplied by the civil service board. Subject to the same restrictions, he has the right to suspend or to remove appointive officials. Fourth, the city manager takes general responsibility for the conduct of the city's business in all its branches. It is his duty to instruct the heads of departments, to secure a proper interlacing of their functions, to investigate complaints concerning their work, and to compose any differences which may arise among them.

The city manager is chosen for no definite term. He may be dismissed

of his first choice, the figure 2 after the name of his second choice, etc. Then, when the polls are closed, the election officers compute the number of votes needed to elect a candidate and this is called "the quota." This they do by dividing the total number of votes cast by the number of places to be filled, plus one, and then adding one to the quotient. For example, let us suppose that 10,000 votes have been cast and that there are seven candidates to be elected. Ten thousand divided by eight (seven plus one) is 1,250, and any candidate who receives 1,251 first choice votes is declared elected. If such candidate, however, has more votes than enough to fill his quota, the surplus votes are distributed in accordance with the indicated second choices among candidates whose quotas have not been filled. If enough candidates are not elected by this process, the candidate with the smallest number of first choices is then dropped and his votes are distributed in the same way. This process of elimination and distribution goes on until enough candidates have filled their quotas or until the successive eliminations have left no more than enough to fill the vacant positions. For an exhaustive explanation see C. G. Hoag and G. H. Hallett, *Proportional Representation* (revised edition, New York, 1940).

[1] The city auditor or controller, the city attorney, and sometimes the city clerk are usually excepted from this rule.

by the council or commission at any time. He need not be, at the time of his appointment, a resident of the city, and it has been quite common for cities to bring in an outside man. He is paid a good salary, gives all his time to his job, and is assumed to be secure in his position so long as he does his work acceptably. Members of the council are forbidden to interfere with him in the performance of his administrative work. The manager prepares the city budget and submits it to the council, which may change it at will. But once having adopted a budget, the council has nothing to do with the spending of the money. That comes wholly within the manager's jurisdiction.

TERM, SALARY, AND QUALIFICATIONS.

On paper, this seems to be an admirable plan, sound in its conception and free from the obvious shortcomings which characterize the two other types of municipal government. How has it fared in actual operation? Unquestionably it has helped to unify administrative work and eliminate friction among the various departments. It has broadened the field from which the city may choose its administrative talent. It has paved the way for the introduction of better budget-making methods in the smaller cities, as well as for improved accounting, the centralized purchasing of supplies, and the honest awarding of contracts. Floating debts have been wiped out in many cities and expenditures kept within the appropriations. There has been a noticeable improvement in administrative routine, in the methods of reckoning unit costs, and in the fixing of regular salary schedules for city employees. The manager plan has relieved the councilmen from the necessity of dealing with innumerable minor problems and has thus enabled them to concentrate their attention upon the larger problems of municipal policy.

MERITS OF THE PLAN.

On the other hand, the adoption of the city manager plan has not always enabled cities to lower their tax rates, or to make any appreciable reduction in annual expenditures, or to cut down their bonded indebtedness. It has accomplished some of these things in individual cities, but not in general. It has not always eliminated the evil of deficits at the end of the fiscal year. The manager plan has helped to raise the standards of integrity and competence in municipal administration, but it has not been able to remove political pressure from the work of the city departments. In general, it has given new proof to the old axiom that the people of a city will get no better government than they insist on getting.

WHAT IT HAS FAILED TO DO.

One thing has become plain enough: namely, that the city managers are themselves the biggest factors in determining the ultimate success

or failure of the plan. The theory is that a nonresident ought to be chosen without hesitation if he seems to be the best man in sight; likewise that he shall be paid a salary in keeping with his attainments, and that when installed in office, he shall be left there so long as his work proves satisfactory. Those ideals are certainly the right ones, but they are not always lived up to. One finds, here and there, an insistence that the city manager shall be a local man, "one who knows local conditions," not an outsider who will have to learn his way around.

THE MOST IMPORTANT FACTOR IN DETERMINING SUCCESS OR FAILURE IS THE MANAGER HIMSELF.

This insistence upon a local man, if it becomes general, will ultimately mean the selection of some local politician who is influential enough to get a majority of the council pledged to him. If the people will tolerate it, politicians will electioneer for the office of city manager as they have electioneered for the office of mayor; they will organize, build up political machines, and endeavor to see that men of independent attitude are not elected to the council. From pledged-in-advance councilmen it would not be a long step to the direct election of city managers by the people. Then we would have managers of the mayoral type under a different name.

THE MOST SERIOUS DANGER WHICH THE CITY MANAGER PLAN NOW FACES.

So the greatest problem of city manager government is to get the right manager. And no city can solve this problem unless it is prepared to pay the price. It must pay a higher salary than it was accustomed to pay its mayor, but local sentiment often recoils from doing this. A business finds it worth while to pay twenty or thirty thousand dollars per year in order to get the right manager; but the people of the city balk at doing anything of the sort. Councils do not dare to bid high because there are many voters to whom twenty or even ten thousand dollars looks more like a fortune than a salary. The average voter thinks of the city manager in terms of work rather than in terms of responsibility. The position looks to him like a soft job, with short hours and plenty of help.

FINDING THE RIGHT MANAGER.

As a matter of fact, it is everything but that. The successful city manager must not only be well versed in the technical phases of city administration; he must have energy, good judgment, and ability to get along with his subordinates. He must hold the confidence of the city council in order to retain his job, which means that he must not make mistakes which recoil on the councilmen. If he does, they get rid of him; and the ratio of official mortality among city managers has been high. Many of them have been unable to stay in office more than four or five years. The manager must also know

THE QUALITIES NEEDED.

how to deal with the press, the public, the city employees, and the local politicians. In a word, he needs the wisdom of Solomon, the statesmanship of Moses, the patience of Job, the courage of Daniel, and the hide of a rhinoceros.

But men possessing these qualities are not plentiful and their services are rarely to be had for the salaries that attract politicians. Most of the city managers now in office have been drawn from the engineering profession, and naturally so, because the physical enterprises (streets, parks, water supply, sewerage, public lighting, etc.) bulk large in city administration. But competent engineers are not always proficient in their grasp of the city's legal, financial, and social problems. One sometimes hears the criticism that most city managers turn out to be engineering technicians rather than all-around administrators. If this criticism is well founded, it points to the fact that there has been no form of professional training available for city managers. There has been no place where a man could get a combined education in engineering, municipal law, budget-making, social welfare, and practical politics. Such a training could readily be provided by most American universities, but they are reluctant to encourage young men to prepare for this profession until they are sure that a city managership is not merely a brief interlude between appointment and dismissal.

WHERE CITY MANAGERS COME FROM.

One serious defect of the city manager plan is that it makes no provision for authoritative political leadership. The city manager is supposed to take no hand in local politics. The council has a chairman (sometimes called a mayor), but he is not vested with the function of political leadership. Yet leadership there must be, and if it is not provided from inside the frame of government it will arise from outside. City government is not merely business; it is also philanthropy, human relations, and politics too. You cannot keep politics entirely out of any form of government except a despotism. Problems which are tinged with politics will come to the city manager's desk, whether he wants them there or not. He cannot wholly disregard the political bearings of the recommendations which he makes to the city council. For if he does, the councilmen will soon find him an embarrassment. On the other hand, if he takes politics into account he becomes, sooner or later, something of a politician himself and he usually turns out to be a poor one, fitted for the role by neither temperament nor training.

THE QUESTION OF POLITICAL LEADERSHIP.

Yet when all has been said, pro and con, it cannot be denied that the city manager plan has great merits and has been a boon to most of the cities that have tried it. It does not guarantee efficient administration,

of course, but to a larger extent than any other plan it facilitates that kind of administration. Cities should bear in mind that the manager, however competent, is only half the governmental setup. The council is the other half, or more than half, for the ultimate power rests in its hands. With a partisan, small-minded, self-seeking, spoils-grabbing set of councilmen, no city manager can instill much real efficiency into the city's administration. The voters must do their part at the council elections in order to make the plan succeed.

THE CREDIT SIDE OF THE LEDGER.

The preceding pages have indicated that the past half century has witnessed an amazing amount of experimentation in the structure and methods of municipal government in the United States. Mayor-council governments have in many cases been modified to strengthen the mayor and to centralize administration. In many instances, this form of government has been supplanted by the commission plan, while both mayor-council and commission plans have in many instances given way to the manager plan. On the whole, the effect of this experimentation has been good, although people have sometimes been persuaded into the belief that if one brand of city government were only replaced by a different one, the political millennium would begin to dawn. Reformers have too often led them to expect that, with the advent of the new setup, tax rates would drop, the budget would be balanced, the city debt would be reduced, corruption even in its subtler forms would vanish, political bossism would shrivel before the blasts of civic virtue, incompetence among public officials would disappear, and local democracy in its noblest and purest form would come into its own. Then, when the Utopia failed to materialize, there has been disappointment and chagrin. On the other hand, those cities which set a curb on their initial enthusiasm have in most cases achieved from their new municipal regimes most of what they had hoped for. At any rate, the past fifty years have seen a renaissance of civic interest in the United States. Standards of municipal government are everywhere higher than they were a half century ago. To be sure, much remains to be done, but no longer would any distinguished foreign student of the American political scene have the hardihood to designate the government of cities a "conspicuous failure" in the United States, as Lord Bryce did in his notable book on *The American Commonwealth* sixty years ago. Nor would a volume on *The Shame of the Cities* by an American author be able to incorporate in its chapters today much of the shamefulness that was so freely at the muckraker's disposal when the present century was young.

CONCLUSION.

The problem of governing metropolitan communities has become one

of great difficulty during the past fifty years. With improved methods of transportation each large city has developed an encircling ring of satellite communities outside its own municipal boundaries. These outlying municipalities have their own systems of local government, each independent of the others; nevertheless, the whole region forms a single metropolitan area as regards its problems of city planning, transportation, water supply, and business integration. In some cases, the solution has been sought by the outright annexation of these satellites; in other instances, the attempt has been made to work out some sort of federal organization which would centralize control over metropolitan services while leaving the individual units a certain amount of local autonomy. The latter plan has not proved very practicable in the United States, although some European cities, notably London, have found it advantageous.[1] Still another solution occasionally applied has been to establish special districts embracing the entire metropolitan area for the administration of some specific function, such as water supply or the establishment and maintenance of parks and recreational facilities. One objection to this plan is that it involves a further division of governmental responsibilities and adds some new public authorities for the voter to watch.

METROPOLITAN GOVERNMENT.

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[1] For a full discussion see Thomas H. Reed, *Municipal Government in the United States* (revised edition, New York, 1934), Chap. xxii, Paul Studenski, *The Government of Metropolitan Areas* (New York, 1930), and V. Jones, *Metropolitan Government* (Chicago, 1942). The related problem of metropolitan counties is touched upon in the present volume, see p. 809.

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See also the references at the close of the next chapter.

CHAPTER XLVII

MUNICIPAL ADMINISTRATION

In many of its more important aspects a city is not so much a miniature state as it is a business corporation, its business being to wisely administer the local affairs and economically spend the revenue of an incorporated community. As we learn this lesson and apply business methods to municipal affairs, we are on the right road to better and more satisfactory results. — *John F. Dillon.*

GOVERNMENT OR BUSINESS: WHICH IS IT?

At the close of each year, the city authorities issue a printed volume, its pages well packed with figures. This is called the annual report; it contains a statement of revenues and expenditures, a summary of what each department has done during the year, and a great many other facts about the work of the city officials. Very few people ever read these annual reports, and not many would understand them if they did. But any thoughtful man or woman who takes the trouble to look through one of these publications is tempted to ask: why do they call such things *government?* Here is an account of how streets have been paved, water distributed to the people, public buildings constructed, property protected, parks maintained, supplies purchased, contracts awarded, labor employed, money collected and money paid out — aren't these simply business operations? The problems that arise in connection with them are business problems; the methods needed are business methods; the organization best fitted to do the work is a business organization.

EXTENT TO WHICH IT IS APPLICABLE.

Of course there is a good deal to be said for this point of view. A large part of the city's work is not governmental in the usual sense; that is, it does not consist in making or enforcing laws. Most of the laws which now apply within the confines of the city are made by the state legislature. Even in a large municipality there are surprisingly few ordinances passed by the city authorities in the course of an entire year. Most of the city government's work has to do with the voting of appropriations, the appointment of officials, the employment of labor, the awarding of contracts, the purchase of supplies, and other such functions which ought not to be performed in a political or partisan spirit. It is work which requires honesty, skill, and

experience on the part of those who do it. It is work that cannot be well done if political influence and personal favoritism are permitted to sway the minds of the authorities.

Nevertheless, and in spite of all this, the administration of a city is not merely a business problem. It is more than that. The business analogy, if pressed too far, does harm. The aim of business is to make a profit, while the aim of a city government is to promote the best interests of the citizens on a nonprofit basis so far as financial resources permit. The city's mission is not to make money but to spend money. Business seeks to produce a surplus, but the city has accomplished its purpose if it manages to make both ends meet. The city authorities, moreover, must spend money in accordance with the desires of the people; they cannot always follow their own judgment in determining what is the wisest expenditure.

WHERE THE ANALOGY FAILS:

1. BUSINESS AND GOVERNMENT DO NOT HAVE SIMILAR AIMS.

A business organization does not have to heed the public at every turn, but the officials who carry on the business of government must defer to it. They must give effect to the desires of the citizens, even when those desires are at variance with what is believed to be the best policy; otherwise the voters will change the officials. For this reason the heads of a business organization have a far greater range of discretion; they can plan and decide with a freedom which the public authorities do not possess. One reason why municipal affairs are not always conducted in a businesslike way may be found in the simple fact that public opinion often insists on methods which are not businesslike.

Another consideration is worth bearing in mind. Some branches of municipal administration lend themselves very easily to the use of business methods, while others do not. Acquiring land for new streets, paving them, cleaning them, keeping them lighted — these are business operations. The sole problem is to get the maximum material value for the amount of money expended. But this does not hold true to the same extent in the department of public charities, or unemployment relief, or public recreation. In these branches of work the human touch is essential. It will not be denied, of course, that here also the aim is to get the best results for the money, but this cannot always be done by applying routine methods and refusing to take any but economic considerations into account. Goodwill and contentment among the people who are most concerned (be they recipients of relief, or unfortunates in public institutions) are worth paying for.

2. THE WORK OF THE CITY IS SOCIAL AS WELL AS ECONOMIC.

The administration of a city, therefore, is more than "a series of

business problems." It must take political and social, as well as economic, conditions into account. It is, in general, the problem of satisfying a large number of self-willed and insistent voters who often desire things which are not for their own best interest. The voter, as well as the dollar, is a unit in municipal government; although to read some discussions of the subject, you would not suspect it. To make a city administration efficient, while still keeping it popular, is a more difficult task than most people realize. To be a success, a city administration must be able to succeed itself, that is, to get a vote of confidence from the people when the next election comes around.

THE GENERAL DIVISIONS OF THE CITY'S ADMINISTRATIVE WORK.

The administrative activities of the American city fall into a number of general divisions. First, are the protective functions, including the maintenance of police and fire departments. This includes not only the safeguarding of life and property by the usual methods, but all measures that are taken for the prevention of crime and conflagration. Second, comes a group of physical activities connected with public works such as streets, parks, and public buildings. City planning naturally has a close relation to this branch of municipal administration. Third, there are enterprises connected with public health and sanitation. Fourth, come education, recreation, and public welfare. Fifth, there are functions relating to public utilities, such as water supply, lighting, and transportation. Sixth, we have financial administration, including such matters as assessments, taxation, expenditures, auditing, and loans. And, finally, there are numerous administrative activities of a miscellaneous sort which do not fall readily into any of the foregoing groups.

BREADTH OF ITS RANGE.

Municipal administration, therefore, covers a wide range. It includes work of a varied character, extending all the way from the registration of births to the planning of bridges, from the holding of elections to the management of a lighting plant. Obviously the work has to be apportioned among various departments — a street department, water department, health department, finance department, and others. The number of these departments must depend upon the size of the city and the scope of its activities. Under the commission plan of government (as described in the immediately preceding chapter), there can be only five departments. In a large city this is too few. It involves the crowding of unrelated functions into the same department. On the other hand, the tendency in most mayor-and-council cities has been to multiply departments needlessly. Some have twenty or thirty of them. The proper number cannot be determined by applying any rule. There ought to be enough administrative machinery to do the work, and

no more. The heads of departments ought to be appointed by the mayor or the city manager. Some departments (such as police and fire protection) are best managed by single heads; others (such as relief, parks, and public recreation) may very well be placed under the control of a board. In any event, the heads of departments, with one or two exceptions (such as the school department, for example) should be responsible to the city's chief executive. It is only in this way that good cooperation among all the departments can be secured.

Public safety, the safeguarding of life and property, is an important function in all organized communities. It includes, primarily, the two departments of police and fire protection. Modern police organization began in 1829 with the enactment of Sir Robert Peel's famous statute for reorganizing the police administration of London. The statute swept away the old watch and ward system of day constables and night watchmen, replacing it with a body of professional, uniformed police officers.[1] The results were so advantageous that other English cities adopted the plan, and it was eventually copied by American municipalities as well. Today, the work of policing is entrusted in all urban communities to officers who devote their entire time to the service. The system of part-time constables remains in small towns and rural areas only.

PUBLIC SAFETY.

WHAT IT INCLUDES:

I. POLICE.

In large American cities, the police department is headed by a board or a single commissioner, the latter being the more common plan.[2] He is usually appointed by the mayor; but in four large cities the head of the police department is appointed by the state authorities.[3] In cities which have adopted the commission type of government, the police and fire departments are combined under a commissioner of public safety, and this plan is also followed in some cities which retain the mayor-and-council form. In smaller and medium-sized communities, this combination has some important advantages; but, in large centers, each department is of sufficient importance to have its own head. The commissioner, superintendent, or chief is in immediate charge of the entire force and supervises its work from headquarters.

POLICE CONTROL.

Whether police administration will be honest, efficient, and humane

[1] Sir Robert Peel, who established the first regular police force in England, made himself very unpopular for a time by this step. The members of the new police force, by way of ridicule, were called "peelers" and "bobbies," and these nicknames persist in England to the present day. They wore blue coats with copper buttons, for which reason the London youngsters also referred to the policeman as "the copper." In America we have shortened it to "the cop."

[2] Sometimes he is called superintendent, marshal, or chief.

[3] St. Louis, Boston, Baltimore, and Providence.

depends in large measure upon the patrolmen. The method of selecting these officers is accordingly a matter of prime importance. Forty or fifty years ago it was the invariable custom to let political and personal influence dictate appointments and promotions, but today in a great many cities the police department has been brought under civil service rules. Likewise it was the practice to set patrolmen at work without any preliminary training, but the largest cities nowadays maintain regular training schools, in which the essentials of a police officer's duty are taught. In large urban centers, actual supervision of patrolmen is entrusted to officers of the force who bear military titles (captain, lieutenant, and sergeant), but special bureaus or divisions are established at headquarters to handle various types of police work, such as criminal identification, homicides, traffic regulation, and missing persons.

ESSENTIALS OF GOOD POLICE ORGANIZATION.

The steady growth of traffic congestion has placed a new and heavy burden upon the police establishment. Thirty-five years ago there were no traffic officers in any cities except the largest, and very few of them even there. Today the officers assigned to traffic duty during the day hours constitute in some cities more than one quarter of the entire force. The use of automatic traffic-control devices is keeping this percentage from being further increased. It is customary in the larger communities to have a traffic division within the police department, and the officers who serve in this division are either connected with police headquarters or are distributed to the several stations. Patrolmen are usually detailed to the traffic division from the regular force, but in the larger cities they are given some special training in traffic duties before being assigned.

THE PROBLEMS OF TRAFFIC REGULATION.

European and American police systems have frequently been compared to the disadvantage of the latter. The almost entire absence of police scandals in English cities, for example, has been contrasted with their all-too-frequent recurrence in the cities of the United States. It should be borne in mind, however, that the problem of satisfactory police administration is a much more complicated and difficult one in America than it is on the other side of the Atlantic. In European cities the populations are homogeneous, and almost wholly native-born; in the majority of large American municipalities, there is a great diversity of racial background, with no uniform traditions of personal liberty. European police, moreover, have wider powers and are not restricted to the same extent by constitutional provisions which so often give the lawbreaker more than an even chance in his dealings with the public authorities.

EUROPEAN AND AMERICAN POLICE COMPARED.

The maintenance of law and order in cities depends not only upon the efficiency of the police, however, but upon the honesty and fairness of the local courts. The magistrates or judges of these municipal courts are usually elected, and too often their attitude towards the strict enforcement of the law is influenced by political considerations. It is sometimes argued that the practice of electing these judges of city courts is advantageous, because it secures men who know and understand the conditions under which the people live and who can, on that account, administer the laws more justly. On the other hand, the elective system has its manifest dangers in the way of political pressure. Some large cities, therefore, have sought a safeguard by providing that the judges of the municipal courts shall be appointed by the mayor.

POLICE COURTS.

The second branch of public safety service is the protection of property against destruction by fire. This includes two separate functions: namely, fire prevention and fire fighting. Until recent years very little attention was bestowed upon the former, while so much was given to the latter that American fire-fighting organizations became the best in the world. The annual wastage by fire loss in the United States is appalling; in the cities alone, it is over one hundred million dollars every year. The chief reasons, of course, are the high percentage of inflammable wooden structures, the laxity of the laws relating to fire hazards, and that most conspicuous of American traits, the readiness to take chances.

2. FIRE PROTECTION.

The science of fire prevention, which has made noteworthy progress in recent years, is concerned primarily with four remedial measures. First, there is the fixing of what are commonly known as fire limits, that is to say, regions in which inflammable buildings must not be erected. These areas include the business sections. Second, the cities have tried to eliminate those structural features which experience has shown to be fire-spreading agencies, such as combustible party walls in apartment houses, wooden shingle roofs, unprotected elevator wells, and inflammable connections between the cellars and the first floors of tenement houses. Third, the science of fire prevention has been applied to special structures such as theaters, factories, department stores, and schools, by the enforcement of rules adapted to the needs of each type. Frequent inspections to ensure compliance with these regulations are made by the authorities. Finally, there are campaigns of popular education planned to teach people that ignorance and carelessness are the chief factors in causing unintended fires to start. Wooden walls and shingled roofs do

THE SCIENCE OF FIRE PREVENTION: WHAT IT INCLUDES.

not cause fires to begin, but merely enable them to make rapid headway. Fires break out, in most cases, as the outcome of human negligence.

THE FIRE DEPARTMENTS.

The fire department in nearly all American cities is under a commissioner, or chief, who is usually appointed by the mayor. The officers and men under his control are organized into companies on a semimilitary plan, one company being assigned to each fire district or precinct of the city with a fire station as its headquarters. Firemen are normally divided into two platoons, each of which is on duty for a portion of the twenty-four-hour day, a lesser number of hours being usually included in the daytime than in the nighttime shift. Sometimes, however, three platoons are maintained and the work is then divided into eight-hour shifts. In most of the larger cities, firemen are now appointed under civil service rules, and a few cities have training schools for the new men. American fire departments have been brought to a high plane of efficiency, much higher than those of European cities. This is because the need for quick and effective work, owing to the high conflagration risks, is greater here than there.

PUBLIC PROPERTY AND CITY PLANNING.

Every American city is engaged in the construction and maintenance of public property. This public property includes streets, sewers, bridges, parks, playgrounds, and public buildings. The convenience of the people requires that they shall all be carefully planned and built with an eye to future needs; but for the most part, this has not been done because mayors and other city officials serve in office for short terms, and their main concern is to do whatever happens to be urgent at the time, leaving the long-range problems for their successors. Much of their work has therefore been makeshift in character — a street widened, an additional schoolhouse erected, a fire engine bought, and a few branch sewers put in — but no comprehensive plan for street improvement or schoolhouse construction or the motorization of fire apparatus or sewage disposal has usually been made and followed.

Public buildings have often been badly placed because political influences, rather than public convenience, determined their location. The congestion of traffic on the downtown streets, the lack of parks and open spaces in certain sections of the city, the unsightliness due to the myriad of poles, wires, signs, and billboards in many of the city's thoroughfares — these things are due in large measure to the absence of planning. It is the habit of cities to take little or no thought for the morrow. They expect to grow bigger and busier, but they give small thought to the impending problems which this growth is bound to bring. The best-built city in the

United States is Washington, the streets and parks of which were all planned before a single building was erected.[1]

City planning is the science of designing cities, or parts of cities, so that they may be better places for people to live in. It includes the arranging of streets, the locating of public buildings, the providing of parks and playgrounds, the devising of a proper transportation system, and the regulating of private property in such way as to promote the best interests of the whole community. It is, therefore, or ought to be, the center or focus of all the city's activities, each one of which should be carried on in harmony with the general plan. Only in this way can a great waste of the city's money and serious inconvenience to all classes of the people be prevented.

WHAT CITY PLANNING INCLUDES: THE BROAD SCOPE OF CITY PLANNING.

City planning also includes zoning, which is the procedure by which the use and occupancy of land is controlled. By the provisions of a zoning ordinance the city is divided into various zones — industrial, mercantile, and residential. Within these various zones all new buildings are restricted to the type and use specified. The purpose of zoning is to make the city develop according to a plan, and not in a haphazard way, with industries and shops encroaching on the residential districts. Zoning thus tends to stabilize property values. But the original setup in a zoning ordinance is not intended to be inflexible; it is changed from time to time as new conditions require.

ZONING.

The streets are important factors in the daily life of every community. They are the city's arteries. On their surface the streets carry pedestrians and vehicles of every sort. They also afford locations for lamp posts, telephone poles, hydrants, mailboxes, and many other instrumentalities of public service. Underneath the street surface are sewers, water mains, gas pipes, and conduits; while overhead are wires and signs and balconies. The streets give access to the shops and houses; they are likewise the principal channels for light and air, both of which are essential to life in the buildings alongside. Nearly every form of public service depends upon the streets; without them private property would have little or no value. About one third of all the land in the city is occupied by the streets, so that proper street planning becomes a matter of great importance to the community.

THE STREETS.

[1] More than a hundred and fifty years ago, when it was decided to build the nation's capital on the shores of the Potomac, President Washington sent to France for Major L'Enfant, an engineer, who had served in the American army during the Revolution, and entrusted to him the task of laying out the new city. L'Enfant took great pains to provide for wide streets; he designated the location of the important public buildings (such as the Capitol and the White House) and left plenty of open spaces in his plan.

THE LAYOUT OF STREETS.

In most American cities the streets are laid out in rectangular form, with long, broad avenues running one way and narrower cross-streets the other. This means that each intersects the other at right angles and the city blocks become squares like those on a checkerboard. This plan has been widely used in America because it takes less land for streets than any other plan would require and it makes all building lots of convenient rectangular shape. The chief objection to this gridiron plan is that it makes traffic more congested at the junction of important thoroughfares. It also gives a sameness to the appearance of all the streets and hampers the development of architectural variety. European visitors often comment on this. Street after street in the shopping or residential districts of American cities all look alike to the stranger; for they have been laid out with a pencil and ruler; and the long rows of houses seem to be all of the same type. In the cities of Europe, on the other hand, the streets are more often curved or winding; some are very broad and some very narrow, so that each street has its own individuality. Increasingly, however, American cities are now laying out diagonal and winding streets in their newer suburbs on the principle that attractiveness ought to be combined with utility.

THE OLD AND THE NEWER METHODS OF DETERMINING WIDTHS.

Until very recent years in all American cities, and even yet in some of them, the practice has been to lay out streets in widths of forty, sixty, or eighty feet — always using multiples of ten. This is a mere rule-of-thumb method and bears no direct relation to the needs of traffic. The downtown streets of the older cities are, for the most part, too narrow; in the newer suburbs they are often a good deal wider than they need be. "But what harm is done by having more street space than is necessary?" it may be asked. Well, every square foot of street space costs money; it has to be paved, kept in repair, cleaned, and lighted. The proper policy in laying out streets is to adapt their width to the probable needs of future traffic. This cannot always be done with mathematical accuracy, because the density of traffic changes from decade to decade; but with careful study, a fairly good estimate can usually be made.

THE TRAFFIC "ZONES."

The best practice nowadays is to fix the width of new streets in terms of *traffic zones*, not merely in multiples of ten feet. A stream of traffic — motor cars, trucks, and other vehicles following one another — requires a certain sluiceway or zone to move in. This zone is ordinarily reckoned as ten feet in width. A zone of parked vehicles alongside the curb uses about eight feet. In order to allow full parking privileges and still have space for two streams of traffic to flow along easily (one in each direction), a street should be thirty-six

feet in width from curb to curb or about forty-six feet including the sidewalks. Anything less than this usually means that parking must be restricted or the thoroughfare must be made a one-way street. Anything more than this is useless unless a full zone of ten feet is added.

TYPES OF PAVEMENT.

Apart from good planning and adequate width, the usefulness of a street depends to a considerable extent on its paving. The qualities of an ideal pavement are easy enough to specify, but not so easy to secure. To reach perfection, a street pavement should be cheap to construct, durable, easy to repair, easy to keep clean, smooth, safe for traffic, noiseless, and attractive in appearance. Unfortunately there is no type of pavement possessing all these qualities. A pavement of granite blocks will last for many years under heavy traffic, but it is expensive to build, noisy, and hard to keep clean. Asphalt pavement is cheaper, cleaner, and smoother to drive upon, but it is slippery in wet weather and breaks down very quickly when heavy traffic is allowed on it. Wood blocks came into favor in many cities for a while because they were believed to make a pavement sufficiently strong and yet afford a surface which is easy to drive over, not difficult to keep clean, and relatively noiseless. But this form of pavement has not measured up to expectations. Oil-bound macadam (which is crushed rock, rolled down and oiled) is now popular. But the point to remember is that no one form of paving is best for all sections of the city and under all circumstances. It is folly to lay asphalt in the wholesale district where the streets are filled with five-ton trucks, and just as absurd to put eight-inch concrete on the streets of fine residential districts from which all heavy trucking is excluded.

THE CONTRACT AND DIRECT LABOR SYSTEMS.

When the pavement has been selected, it can be laid in either of two ways — by contract or by "force account," that is, by city labor. Most pavements have been built by contract. The city officials prepare the plans, and call for bids; paving contractors submit their figures, and the contract is supposed to go to the one whose bid is the lowest. That, however, is not what always happens. Contracts for street paving have often been awarded, on one pretext or another, to contractors who were able to exert political influence. In some cities the work is done by regular employees of the street department, the city buying its own materials. This plan is usually more expensive and it is not practicable when a city wants a great deal of work done in a hurry; on the other hand, it results, as a rule, in getting pavement of a better quality. Contract work, too often, is done hastily, is not subjected to sufficiently rigid inspection and proves defective.

PARKS.

Public parks are of two types: first, the large open spaces which cover many acres and can be used by the whole city, and second, the small areas which are provided for use by a single neighborhood only. Every large city has parks of both types. The old-style park, which served more for ornament than for use, is now out of favor. Cities are placing more stress on grounds which can be used for athletic games, picnics, or other forms of recreation. They are also building swimming pools and municipal golf courses. In communities which have the advantage of being located on the ocean, on a lake, or on a river, the water front is a highly desirable addition to the available recreation spaces. Suitable bathing beaches ought to be acquired by the cities for free use by the people. The development of street railway and motor transportation has lessened the pressure upon the downtown parks by making it easier for the people to get out into the country.

THE VARIOUS CLASSES OF CITY BUILDINGS:

1. THOSE WHICH NEED CENTRAL LOCATION.

From the standpoint of suitable location, the public buildings of a city may be divided into three classes. First, there are those public buildings which ought to be centrally located so that they may be easily reached from every part of the community. This class includes the post office, the city hall, the courthouse, and the public library. In a few cities these buildings, or most of them, have been brought together in a civic center; but, as a rule, they are scattered here and there all over the community, wherever they may chance to have been placed in obedience to the influence or whims of the moment.[1] The desirability of bringing them together, both as a matter of good planning and for the public convenience, is easy to realize.

2. THOSE WHICH MUST BE SCATTERED.

Second, there are many public buildings which must be located in different parts of the city rather than at a single center. These include the fire-engine houses, police stations, elementary schools, and branch libraries. They must necessarily be scattered, but this does not mean that they should be located heedlessly. Very often in the past these buildings have been located at inconvenient points because political pressure, rather than the public interest, has determined the choice of the location. When a prominent politician has land to sell at a fancy price, the city is too often regarded as a good customer. There is no good reason why police and fire stations should not be housed under the same roof. Nor is there any good reason why the school, the public playground, and the branch library should not be located close together, yet rarely are these three places of instruction and recreation within sight of one another. Hap-

[1] Good examples of a civic center may be found in Cleveland and in San Francisco.

hazard location and slipshod construction have resulted in large amounts of needless expense in the case of these buildings.

3. THOSE WHICH NEED SPECIAL LOCATIONS.

Third, there are certain public buildings which have to be placed in special locations. Public baths, for example, go to the water's edge, wherever it is. The general hospital should be situated outside the zone of heavy traffic and continuous noise. The city prison, the refuse incinerator, the contagious hospital, the garbage disposal plant, and the other waifs among public buildings — nobody wants their company. They are not welcome in any neighborhood, yet they must be placed somewhere. Timely planning would help to solve this problem by securing convenient and spacious tracts of land before the city grows so large that all available sites are occupied, but most of our cities give little thought to such questions until the problem becomes urgent.

PUBLIC HEALTH AND HYGIENE.

No branch of municipal activity has made more conspicuous progress during recent years than the care for the public health. This, in turn, has been the result of the notable advance in preventive medicine and public hygiene. The old boards of health, with their hit-or-miss methods, are giving way to trained health commissioners. The work of a municipal health department includes the collection and interpretation of vital statistics as a means of determining the health status of the community. Few people realize that prompt and accurate reports relating to diseases and deaths form the groundwork of efficient health administration. Public health work also includes the quarantining of communicable diseases, the inspection of food and milk — in fact the control of every agency by which disease may be spread. As a result of this work, the death rate is being steadily reduced.

PUBLIC SANITATION.

Public sanitation is the term applied to the removal and disposal of waste. The congestion of factories, shops, and dwellings in cities makes waste disposal a problem of great importance. And, of course, the most constantly dangerous of human wastes is sewage or polluted water. There are more than one hundred gallons of it to be handled daily for every head of population. Some municipalities merely discharge their sewage into the ocean or into a convenient lake or river. But this practice, particularly where it involves inland waters, has run foul of the public health authorities, who are properly concerned about the menace to the public health involved. It also results in the partial destruction of marine life and impairs the use of the beaches or river banks for recreational purposes. Many cities have, therefore, installed elaborate plants which render sewage harmless

by chemical treatment, or by some other process, before it is discharged into a waterway.

Garbage and refuse offer another major waste-disposal problem. Cities nowadays normally assume responsibility for collecting these wastes directly through their sanitation departments or by contract with some private operator. Past methods of garbage disposal have evoked much criticism. Often such material has been dumped on unsightly and unsavory heaps just outside the city limits; or, in seaboard cities, it has been thrown into the ocean where it is washed back upon the shores with the next tide. Modern disposal plants, now being erected by an increasing number of municipalities, eliminate most of such wastes either by a garbage reduction process or by incineration, the latter being the more common.

PUBLIC UTILITIES:

The term "public utilities" is used to designate such services as water supply, gas, electricity, street railways, motor busses, telephones, power-transmission lines, etc. These services are sometimes owned and operated by the city, but more often (except in the case of water supply) they are supplied by private companies under franchises. In that case, they are subject to regulation by the municipal or state authorities in order to ensure good service at reasonable rates.

1. WATER SUPPLY.

Water supply is the oldest and most essential among these various public utilities. A few American cities still leave this service to be provided by private companies, but in the great majority it is owned and operated by the municipality. The water problem is twofold: first, to secure and maintain an adequate and safe source of supply; second, to provide for its distribution to the factories, shops, and homes of the city. In some cases, a safe and adequate supply can be found within a reasonable distance of the city; in others, the water must be brought a long way or must either be purified by filtration or chemically treated to make it safe. Large groups of the population make heavy demands upon water supply, averaging over one hundred gallons per capita every day in the year. In its relation to public health, the city's water supply is manifestly of supreme consequence, and that is the chief reason for taking it directly under public control.

2. LIGHTING AND TRANSPORTATION.

This health consideration does not operate to the same extent in the case of gas, electricity, telephones, and transportation. Public ownership is not so clearly indicated as the only way of protecting the public interest. But public regulation is essential; the only question is whether the regulation can be best provided by each city for itself or by the state for all the cities within its borders. The tendency is towards regulation by the state because the

same public utility (telephone or street railway service, for example) may operate in several municipalities and local regulation cannot then be made very effective.

THE REGULATION OF UTILITIES.

A public utility is a natural monopoly. No ultimate good comes from the maintenance of a competitive telephone service, because in that case two instruments and two directories are needed in every home in order to get full coverage. Public utilities occupy a field in which competition means duplication of facilities, public inconvenience, and a far higher cost of service in the end. Two practical alternatives, and only two, are open to a city. It may give a complete monopoly to some one telephone company, street railway company, or gas company, within a defined area, and then trust to public regulation for the protection of the public interest. Or it may acquire the service and operate it under municipal ownership.

MUNICIPAL OWNERSHIP.

This latter alternative, municipal ownership and operation of public utilities, has made considerable progress in the United States, although not so much as in European countries. Among these utilities, electric light and power plants have been especially favored for municipal acquisition and operation, more than a fourth of the total in the nation being publicly owned. But many of these serve small constituencies; hence they do not account for a large percentage of the total light and power output of the country. In recent years, some municipalities have been encouraged to purchase their power from private generating companies or from such nationally operated power projects as the Tennessee Valley authority, in which case public ownership extends only to the distributive apparatus. Gas plants have had no comparable development, since there are only about thirty municipal gas plants in the entire country, as compared with about fourteen hundred in private hands. Among American cities having over 30,000 population, only five or six own and operate their own gas-producing or distributing facilities.

In the matter of street railways, the cities of the United States have had even less experience with the policy of municipal ownership until very recent years. At the present time, however, San Francisco, Detroit, and Seattle own and operate their street railway systems in whole or in part. Moreover, the nation's largest city, New York, after having experimented for many years with a combination of public and private ownership of certain of its facilities, has finally taken over its entire rapid transit system and now operates it as a unified municipal service. In certain other large cities, the street railway system is privately owned but is operated on a "service-at-cost" basis by the public authorities.

ITS MERITS AND DEFECTS.

Experience with municipal ownership in American cities would seem to indicate that wages go up when the city takes control; that the quality of the service rendered is not better than under private ownership; that an additional burden is usually placed on the taxpayers; and that political considerations rather than business principles often interfere with the proper management of the utility. On the other hand, municipal ownership assures some protection against the avaricious practices which have been so common under private operation, such as the inflation of capital stock, the payment of extravagant salaries for managerial and legal services, and the arbitrary treatment of employees. The question as to which policy is the better cannot be answered in general terms. It can only be determined with reference to a particular city and a particular form of public service.

MISCELLANEOUS ENTERPRISES.

Many municipalities have a proprietary interest in various special facilities. Those which are seaports often own piers and docks which they make available to steamship and other transportation companies at a fair rental. The progress of transportation by air has induced many cities to establish and equip landing fields and air terminals. New York, for example, has spent many millions in building one of the world's largest and best-equipped air terminals for domestic and transocean air commerce and is currently engaged in building another. Some of the larger urban centers likewise operate wholesale markets on the assumption that their congested populations require the public authorities to facilitate an adequate supply of perishable foods. These additional activities emphasize the expanding character of municipal administration.

PUBLIC EDUCATION.

Measured by the amount of money spent upon it, education is the most important of all municipal functions. Because of this, and the alleged desire to keep the schools out of politics, the school system is usually placed under the supervision of a separate board, wholly or partly independent of the municipal government. The members of the board are commonly elected directly by the people but in some cities are appointed by the mayor. Sometimes the board of education is elected by the voters of a school district which does not coincide with the city in its area. In general, these boards have three groups of functions to perform. First, they provide the school buildings and keep them in order. Second, they have duties of a business nature, such as the purchase of fuel and supplies, the buying of school books, and the management of school finances. In some cities, the school taxes are assessed and collected under the direction of the board itself; but more often the funds for the support of the schools are obtained in part from

the general city or county revenues and in part from the state. Finally, these school boards have the duty of appointing the school superintendent, engaging and promoting teachers, determining salaries, approving changes in the school curricula, and settling all questions of educational policy. These functions, when taken together, are of far-reaching influence for good or ill.

THE WIDENING SPHERE OF PUBLIC EDUCATION.

To a greater extent than in most other city departments, the school authorities have been called upon for many new public services during recent years. A few cities, notably Cincinnati, Detroit, and New York, maintain educational institutions of college grade. In the latter city, indeed, there are four separate municipal colleges, operating under a special board of higher education, with some of the largest academic enrollments in the world. In addition, educational authorities are nowadays required to provide evening schools, part-time schools, continuation schools, junior colleges, adult education, special classes for handicapped or defective children, medical and dental inspection of pupils, vocational guidance, and the use of schools as neighborhood centers in evening hours. These indicate only a few of the more important services which large communities now call upon their school authorities to provide in addition to the work of ordinary education. During recent years, moreover, the establishment of public playgrounds and the supervision of play have in many cities been transferred from the park to the school department. Supervised play outside of school hours is now recognized as an integral part of a community's educational system.

PUBLIC LIBRARY ADMINISTRATION.

The public library is becoming a more effective agency of public education than it used to be. A generation ago it was merely a depository of books; today it has become, in many cities, an active agency of public enlightenment. It renders informational service to public officials, business organizations, newspapers, authors, and students of every subject. Illustrated lectures are often provided; reference rooms are maintained with intelligent attendants; seekers of books are sometimes permitted to browse among the shelves; the whole atmosphere of a well-managed public library has now become surcharged with a spirit of active service. A close coordination between library and school administration has also had beneficial results, for it is from the schools that the future patrons of the library must be recruited.

Then there are the "public welfare activities" which city departments are carrying on. One of the most important of these is relief for the unemployed and unemployable. Occasionally, to be sure, this is the

responsibility of the county in which the city is located; but most of the larger cities handle this task directly in cooperation with the state and federal governments and with funds partially supplied from those sources. Municipal relief activities reached vast proportions during the depression years after 1930 and utterly dwarfed the contributions from philanthropic sources which, prior to that time, had carried most of the load. The relief was largely of the "outdoor" variety; that is, food, services, shelter, and medical care were supplied directly to persons and families officially adjudged to be in need. At the same time, cities have continued their institutional relief by supporting almshouses, orphanages, and other establishments for the socially dependent, where private philanthropy has not supplied adequate funds.

PUBLIC WELFARE WORK.

Municipal welfare departments are also likely to be charged with the maintenance of local prisons and correctional institutions, although most of these establishments fall under the jurisdiction of the county or state. The modern city is likewise engaging in a great number of other welfare activities, the purpose of which is to diminish crime, disease, poverty, and delinquency. The list of such activities would cover a whole page and is steadily expanding. It includes such things as free employment bureaus, free legal aid, mothers' pensions, milk stations, district nursing, medical and dental clinics, municipal lodging houses, recreational supervision, as well as band concerts and other entertainment. Recently, too, because of the opportunity to secure federal aid, American cities have been showing interest in public housing. Under recently enacted legislation, the federal government makes loans and grants to local housing authorities in order that they may condemn and raze slum areas, replacing the sordid living quarters by decent housing facilities for low-income families. Public housing projects have long been common in European cities, but not until recently have American municipalities undertaken them. Like many other municipal innovations, this one is sometimes stigmatized as paternalism; but the proper housing of the people would seem to have a considerable relation to several long-established municipal activities such as the safeguarding of the public health, the prevention of crime and delinquency, the elimination of fire hazards, and the whole subject of zoning.

OTHER WELFARE ACTIVITIES.

All these municipal enterprises cost money. Where does the money come from? Most of it is obtained by levying a municipal tax upon real estate and personal property. The property is assessed or valued by officials known as assessors, but an appeal may usually be made to a board of review. When the assessments

MUNICIPAL TAXATION.

have been revised and confirmed, a tax rate is figured, sufficient to provide such revenue as the city needs. This tax rate is fixed at so many mills on the dollar, or so many cents per hundred dollars of valuation, or so many dollars per thousand.[1] Then the property owner gets his tax bill, and pays it. If he does not pay it, his property is sold by the city at a tax sale, but the owner usually has the privilege of buying it back (interest and costs added), within a specified time.

OTHER SOURCES OF INCOME.

Other municipal income is derived from license fees, taxes upon public utilities, profits from business enterprises owned by the city, subsidies from the state treasury,[2] special assessments for street paving or other improvements, and sometimes revenue from sales and business taxes. But all these put together do not usually form a third of the total revenue; by far the larger part comes from taxes on property. And since the need for more revenue has been growing steadily, this tax rate usually has to keep pace with it.

THE BUDGET.

Out of this annual revenue the city council (or commission) makes appropriations for the use of the various municipal departments. These appropriations are embodied in a yearly budget which may be prepared by the mayor, or by the city manager, or by a special board, or by a committee of the city council. In any case, the budget does not go into effect until the council (or commission) has approved it. Public improvements of a permanent nature, such as the widening of streets, are sometimes financed by borrowing money on the general credit of the city; in other instances, a special assessment is levied upon the neighboring private property which is assumed to be benefited by the work. Borrowing is also resorted to when the city acquires some public utility or undertakes a large public improvement. Municipal borrowing by the issue of bonds sometimes requires an affirmative vote of the people (or of the property owners) at a "bond election," and, in any event, the state often fixes a municipal debt limit above which the city cannot go. This limit is ordinarily fixed at a percentage of the total assessed valuation of property in the city — say 5 or 10 per cent. The bonds of municipalities are sold to banks, brokers, and the investing public, and are retired by methods similar to those already discussed in the case of state bonds.[3]

MUNICIPAL BORROWING.

[1] A tax rate of 22 mills on the dollar, or $2.20 per hundred dollars, or $22 per thousand, for example, is merely the same rate expressed in different ways by different cities.

[2] The state sometimes levies an income tax, for example, and distributes a part of the proceeds to the cities. In many states large subsidies are given for the support of the city schools. Again, in some instances, the state gives back to the cities, for the maintenance of streets, a portion of the proceeds from the gasoline tax.

[3] See p. 724.

All in all, the modern city is an organism of almost unbelievable complexity. Its activities range over a far wider area than the ordinary citizen realizes. Every day in the year its officials have to deal with problems of law, finance, engineering, health, education, and social welfare. No man, even though he spend a lifetime in studying them, can become thoroughly familiar with what we call "the problems of municipal administration." As for the ordinary citizen, he obtains only the most rudimentary conception of them. He thinks it easy to administer the affairs of a city, and wonders why it is not better done. As a first step towards any marked improvement in municipal administration, it is essential to convince the average citizen that the work is difficult, often highly technical, and requires far more competence than the general run of local politicians can supply.

THE UNENDING COMPLEXITY OF MUNICIPAL ADMINISTRATION.

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CHAPTER XLVIII

RURAL GOVERNMENT: COUNTIES, TOWNS, AND TOWNSHIPS

Local institutions constitute the strength of free nations. — *Tocqueville.*

THE COUNTY

The rise of the city has tended to dwarf the rural community in the public mind. Yet rural government is of no slight importance in the United States. It has a close relation to the welfare of over sixty million Americans. So, if a discussion of the subject is condensed into one brief chapter, this is not because it lacks significance in the national picture as a whole, but because rural government is simpler and its administrative problems less complicated than are those of the cities.

THE DRIFT OF THE PEOPLE.

Within the general term of rural government is included the government of counties, towns, boroughs, townships, villages, incorporated districts, and other local communities known by a variety of designations. These areas are not always strictly rural in character; on the contrary, some counties are metropolitan and some towns are cities in everything but name. Moreover, it should not be forgotten that for certain purposes the counties exercise jurisdiction within the territory of cities. For the most part, however, the county, the town, and the township are agricultural communities or closely related to agriculture.

WHAT RURAL GOVERNMENT INCLUDES.

Every state is divided into counties (in Louisiana they are parishes). There are about 3,000 of them and they vary enormously in size. Bristol County in Rhode Island contains less than twenty-five square miles, while San Bernardino County in California covers over twenty thousand. They also vary in population. Cochran County in Texas has fewer than a hundred inhabitants, while Cook County (which includes Chicago) has over four million. For the most part, the county is a firmly established geographical area, and its boundaries are rarely changed in the older states. In the newer states,

EXTENT OF COUNTY DIVISIONS.

the counties were mapped out in the first instance on a large scale, hence they are sometimes divided as population increases.

As a general rule, the creation of new counties is within the power of the state legislature, but in many of the states there are constitutional provisions which limit the legislature's authority by providing that new counties may not be established or the boundaries of existing counties changed without the consent of the voters concerned. The state legislature may determine the form of county government, the location of the county seat (unless the state constitution restricts its doing so), and the duties of the various county officials. This it has usually done by enacting a general county code, but it also passes special laws relating to single counties, with much confusion as a result. Hence, the constitutions of many states now set limitations upon the legislature's discretion in dealing with county affairs. In about a half-dozen states, the inhabitants of counties are permitted to determine their own form of county government through the framing of a county charter and the adoption of this charter by the vote of the people. Home rule for counties thus appears to be following in the wake of home rule for cities. It is to be doubted, however, that the home-rule system will ever gain the headway in counties which it has gained in cities, for the reason that such a large proportion of county functions are not really local but state functions delegated to county officers. Moreover, the movement runs counter to the recent policy of some of the states in exerting more administrative supervision over county activities and in entrusting functions, formerly discharged wholly by local officials, to state boards and agencies.

THE CREATION OF COUNTIES.

LEGISLATIVE CONTROL OF COUNTIES AND COUNTY "HOME RULE."

Counties are established to serve as political, administrative, and judicial districts. They are a political division because, in many of the states, the county is the unit upon which representation in the state legislatures is based, each county electing one or more senators and also its quota of assemblymen or representatives. As an administrative district, however, the county is much more important. Everywhere it is an area of financial administration. The taxes are in many states assessed, levied, and collected by county officers, a part of the proceeds being turned over to the state, a part in some cases to the towns or townships within the county, and the remainder retained for county purposes.

GENERAL FUNCTIONS OF THE COUNTY AS AN AREA OF LOCAL GOVERNMENT: POLITICAL, ADMINISTRATIVE, AND JUDICIAL.

Nearly everywhere, again, the county is given considerable authority with reference to the construction and repair of main highways and

bridges. Occasionally it has the duty of providing other public works as well. The relief of distress due to poverty or unemployment is also a county function in many states. Particularly in the southern states the system of elementary school administration is organized on a county basis. The county is likewise a primary unit for the enforcement of law and order through its sheriff and its deputy sheriffs, especially in sparsely settled regions; and in some parts of the country, it is the unit of organization for the state militia. Finally, the county serves as a judicial district. It is a district for the administration of civil and criminal justice, usually also for the registry of deeds and the probating of wills, and almost invariably for the maintenance of courthouses and institutions of correction. In the judicial systems of the several states, the county court and its various officers form an important part.

THE COUNTY SEAT.

The center of county government is the county seat. The selection is made by the legislature when the county is first established, and the legislature may remove it to some other city or town at any later time; but in many of the states, the constitution forbids this unless the voters of the county approve the change. The county seat is the location of the county courthouse and the offices of the county board.

THE COUNTY BOARD.

ITS ORGANIZATION.

The chief administrative organ of the county in nearly all the states is a county board. Members of this board are usually known as commissioners or supervisors. They differ in number and in method of selection from state to state. In most states the boards are small, consisting of from three to seven members. In some, however, the board is a larger body, including from fifteen to twenty-five members or even more. Sometimes its members are elected by the voters of the county at large; sometimes they are chosen by the townships, one or more from each; sometimes from the various towns and cities in the county, while sometimes (especially in the southern states) the board is made up of the county judge, the justices of the peace, and certain other ex-officio members. There is almost as much variety in American county government as in city government.

THE FUNCTIONS OF COUNTY BOARDS:

The functions of the county board are established by law. Some states have general laws on the subject, but in many of them the duties of county commissioners or supervisors are set forth in a long succession of separate and unrelated special acts of the legislature, which may apply to one county and not to others. Taking the boards as a whole, however, their functions may be grouped under six general heads: financial, highways

and bridges, other public works, welfare work, relief and prisons, elections, and miscellaneous.

1. FINANCIAL.

TAXATION AND APPROPRIATIONS.

THE FUSION OF APPROPRIATING AND SPENDING POWERS.

Most county boards have the right to levy county taxes and to make appropriations for expenditure. There are some exceptions to this, however, notably in certain New England states, where the appropriations are made by the legislature (usually on the recommendation of the county commissioners). In most of the other states, where the county board both makes the appropriations and spends them, there is a fusion of two powers which are usually kept separate in government. In the national government, Congress makes the appropriations and the executive has the function of applying the money to the purpose designated. In state government, the legislature appropriates and the executive spends the funds. But in county government throughout the larger part of the country, the same board levies the taxes, votes the appropriations, and sometimes appoints the officials who spend the money. This has been criticized as an unsafe policy and in practice it has encouraged extravagance.

OTHER FINANCIAL FUNCTIONS.

In addition to the function of levying county taxes, making appropriations, and supervising expenditures, the county board, as a rule, has other financial duties. From time to time, both by general or special law, the board is given authority to borrow money on the county's credit, either with or without the necessity of first securing the approval of the voters. Borrowing powers are frequently obtained in this way for the building of roads, bridges, and county buildings. The county board, again, often serves as a tribunal of appeal from the assessments made by local assessors or as a board of equalization for making the proper adjustments in assessments among different municipalities.

2. ROADS AND BRIDGES.

In many states all the important rural highways are either state or county roads. The towns and townships are responsible for the minor thoroughfares only. Nearly everywhere the county board has authority to lay out, to construct, and to repair the rural highways which are designated as county roads; but there are great differences among the states in the extent to which this authority is exercised. Main bridges, especially those which connect two cities, or towns, or townships, are also commonly built and maintained by the county authorities.

Various other public works are provided by the county, including the courthouse, the county jail, the house of correction, and the registry of deeds. Such buildings are often erected on an expensive scale, more

so than a county requires or can well afford. The management of these buildings, their supervision, repair, and upkeep are also functions of the board. In a few states the county officials have been given other public enterprises to carry through, such as the construction of irrigation works, the abolition of grade crossings, or the building of levees, dikes, and drains. In general, when a project concerns all the municipalities in the county, or several of them, the county board is the natural authority to have charge of it.

3. OTHER PUBLIC WORKS.

Welfare or charitable work is primarily a county rather than a municipal function in most of the states. The county poor farm and workhouse, as well as work camps for the unemployed, are usually under the control of the county officers. Persons who need assistance are sent to these institutions from the towns or townships of the county. When the federal or state governments provide funds for direct relief, because of depression and unemployment, these funds are often allocated to the counties and distributed through agencies set up by them. County hospitals exist in some of the states, but institutions for the care of the insane and the feebleminded are usually provided by the state, not by the county.

4. WELFARE WORK.

County boards have various duties with reference to elections, although the New England states provide conspicuous exceptions to the general rule. Almost everywhere else the county board has charge of election machinery; it designates the polling places, appoints the poll officials, provides the ballot, and canvasses the returns. Sometimes it also draws lots for the jury panels from the voters' lists. The county, as has been already mentioned, is a common area for the selection of senators in the state legislature.

5. ELECTIONS.

Finally, the county board has miscellaneous powers. It appoints some county officers, although in many instances these officials (such as the sheriff, the county prosecuting attorney, the registrar of deeds, the county treasurer, as well as the principal assessor and county clerk) are elected by the voters. The county board sometimes grants charters of incorporation to benevolent associations. Odds and ends of jurisdiction go to the county boards here and there; for example, the extermination of noxious animals, the regulation of schools for truants, the licensing of pedlars, etc.

6. MISCELLANEOUS.

It will be seen that the county board, as the chief organ of county administration, gathers to itself a considerable variety of functions. They are in part legislative, since the levying of taxes and the making of appropriations are legislative functions. But they are in larger part executive, as has been in-

SOME OF THE COUNTY BOARD'S WORK.

dicated. And in some states the county board is officially listed as a court. County boards cannot, therefore, be placed exclusively in the legislative, executive, or judicial division of government, and they are among the very few American political institutions of which that can be said.

THE COUNTY AS A JUDICIAL AREA.

In virtually every county there is a county court, but it is not everywhere organized in the same way. Some states do not have a judge for each county, but group the counties into judicial districts with one judge for each district. This judge then goes on a circuit, holding sessions at the courthouse of each county in succession. Other states provide one or more judges for each county. The judges are usually elected by the voters of the counties or districts, as the case may be, but in reality they form an integral part of the state judiciary.

OTHER COUNTY OFFICIALS: 1. THE SHERIFF.

In addition to the county board and the judge of the county courts there are other officials of county administration. One of the most important, and at any rate the oldest of these offices, is that of sheriff. Every county in the United States has a sheriff and the office is everywhere elective save in Rhode Island. There the legislature appoints the county sheriffs. The name is an abbreviation of the old Saxon shire-reeve, which antedates the Norman conquest of England. During the middle period of English history, the sheriff was the right arm of the crown in the counties, the keeper of the king's peace, and the enforcer of the common law. These functions, in a general way, the sheriff of an American county has inherited. He is the chief conservator of law and order and the executive agent of the county court. The sheriff appoints deputies who assist him in keeping the peace, attending court sessions, making arrests, serving court papers, etc. In sparsely settled counties the security of life and property depends to a considerable extent upon the alertness, honesty, and courage of the sheriff and his deputies.

HIS COLLATERAL FUNCTION: EXECUTIVE OFFICER OF THE COURT.

The sheriff, in addition to his functions as guardian of the peace within the county, is also the chief executive officer of the county court. It is through his office that the judgments of the court are carried out. He is the keeper of the county jail and has the custody of all the prisoners there. He looks after the comfort of juries while the court is in session. He, or his deputies, serve subpoenas upon witnesses, or seize property in satisfaction of judgment, or place writs of attachment upon property, or perform whatever other duties the court may request.

The coroner is another county officer whose functions relate to law enforcement. His duty is to hold an inquest whenever a death takes place under circumstances which excite suspicion of crime. To assist him at the inquest, the coroner usually calls together a jury of citizens (usually six) who hear the evidence and render a verdict. If the jury finds grounds for believing that a crime has been committed, it may so declare in its verdict, whereupon a formal warrant is usually issued for the arrest of the person accused. But neither the coroner nor his jury determines the question of guilt or innocence. That function is left to the regular courts.

2. THE CORONER.

In most of the states coroners are elected by popular vote. To perform his work properly a coroner should be both doctor and lawyer, but as a rule he is neither. His jury is selected by summoning anybody who happens to be near at hand. On the whole, therefore, coroner's inquests have not contributed greatly to the discovery of crimes or the apprehension of offenders. The office of coroner has a long and interesting history behind it, but its procedure is not well adapted to conditions of today. In a few states the coroner has been supplanted by an appointive medical examiner, a physician with a knowledge of criminal law. This medical examiner makes his investigations without the aid of an improvised jury and reports the results, if necessary, to the regular prosecuting officials for action.

UNSATISFACTORY CHARACTER OF INQUESTS IN GENERAL.

The regular prosecuting officer of the county is an attorney whose office bears various designations such as prosecuting attorney, county solicitor, district attorney, or state's attorney. Usually he is elected by the people of the county or district. His chief duty is to conduct prosecutions in the name and on behalf of the state. He prepares the evidence for presentation to the grand jury and advises the jurymen as to whether there is sufficient ground for an indictment. If an indictment is found, the prosecuting attorney is responsible for the proper handling of the case when it is brought before the trial jury. Hence, he has considerable discretion in the way of discontinuing prosecutions, either by entering a *nolle prosequi* (do not wish to prosecute) or by asking that a case be placed on file. The court's approval is sometimes necessary for such action, but more often the prosecuting attorney takes the whole responsibility. As indicated earlier (see p. 731), a few states have abolished the requirement of grand jury action in all but the most serious cases. Proceedings there are begun by an information, which is a sworn declaration made by the prosecuting

3. THE PROSECUTING ATTORNEY.

attorney to the effect that there is sufficient ground for placing an accused person on trial. In some states a preliminary judicial hearing is a necessary part of this process.

VITAL CHARACTER OF HIS OFFICE.

Most people do not realize that the office of prosecuting attorney is by all means the most powerful among local offices. It has almost unlimited possibilities for good or evil. A lax and corrupt prosecuting attorney can make a fortune for himself by selling, delaying, or denying justice. Every lawless element is interested in having that sort of attorney at the helm. On the other hand, a prosecuting attorney who performs his duties with honesty and courage is doing a work which law-abiding citizens ought to appreciate more than they usually do.

4. THE TREASURER, AUDITOR, ASSESSOR, CLERK, REGISTRAR, ETC.

Other county officers are the treasurer, who receives the revenue and makes all payments out of the county funds; the auditor, who inspects the accounts and prepares from time to time a statement of the county's financial condition for presentation to the county board; the assessors, who appraise property for taxation; the clerk of the county court, who looks after the judicial records; the registrar of deeds or recorder; and the county superintendent of schools. These various officials are usually elective, although some of them may be appointed by the county board. It is generally admitted that there are too many elective county officers and the result has been the selection of inferior men. The voter's interest is centered upon the candidates for state office on the one hand and for municipal office on the other. The county, coming in between, receives too little of his attention. Consequently, county nominations and elections have been proverbially dominated by small rings of professional politicians. That is why the county has sometimes been called "the jungle of American politics."

ACTUAL WORKINGS OF COUNTY GOVERNMENT.

County government, however, is not so bad as this expression might imply, although it is by no means so good as it ought to be. Corruption and political dishonesty have not been so prevalent in rural counties as in the cities. But mediocrity in office, unprogressiveness in policy, a failure to get full value for expenditures, favoritism in appointments and in the award of contracts, lack of popular interest in county affairs — these things have all too frequently characterized county administration in most of the states. The situation has been tolerated because the need of reform in other quarters appeared to be more pressing. Now that both state and municipal governments have been improved, the tide of reform is directing itself towards county affairs.

The reconstruction of county government will involve five changes in the present system. First among the needs of county government is a reconstruction of the county board in those states where it is too large and cumbersome. There is no good reason why a county board should have more than seven members. They should be elected by the people of the whole county, or, if this does not seem practicable, by a few large districts. They should have substantially the same powers that the council possesses in cities under the council-manager form of government.

THE NEED OF COUNTY RECONSTRUCTION: 1. THE COUNTY BOARDS SHOULD BE REORGANIZED.

Second, there is need for a unification of executive work in county government. As matters now stand, there is no county official corresponding to the president, governor, and mayor, in national, state, and municipal governments. Executive responsibility is scattered, some of it devolving upon the county board, and the remainder accruing to the various county officers, each of whom is more or less independent of the others. There ought to be a single head with ultimate executive authority as in national, state, and city governments.

2. THE COUNTY EXECUTIVE SHOULD BE UNIFIED.

Much may be said in favor of the "manager plan" in counties, as in cities and towns. The county board should not try to handle the details of administration. It should employ a qualified expert. A few states have authorized the county-manager plan and some counties have actually placed this plan in operation.[1] Where it exists it has merits and defects roughly corresponding to those which the council-manager plan has disclosed in the cities. There are also isolated instances where a partial consolidation of county executive functions has been made and a county executive created who may or may not bear the title of county manager. Progress in the direction of concentrating executive responsibility has been slow because of constitutional difficulties and the unwillingness of vested political interests to give way.

COUNTY MANAGERS.

Third, there should be a reduction in the number of elective officials. There is no good reason why treasurers, auditors, assessors, and clerks should be appointed in cities and elected in counties. The elective principle, when applied to these positions, means an undue lengthening of the ballot with a consequent flagging of public interest in the candidates. With a dozen or more

3. ELECTIVE OFFICES SHOULD BE REDUCED.

[1] For example, see J. C. Calrow, "County Manager Government in Virginia," *National Municipal Review*, Vol. XXVII, pp. 148–152 (March, 1938). For a full discussion see the chapter on "The County Manager Plan" in Arthur W. Bromage, *American County Government* (New York, 1933), and Helen M. Muller, *County Manager Government* (New York, 1930).

county officials to be elected, the average voter will not inform himself of their qualifications, but will be guided entirely by party designations. The party leaders, appreciating this lack of popular interest and information, nominate men who would not be put forward for positions in the state or municipal government. Men of administrative ability cannot be secured for county offices by party nominations and popular election. Officials who have only administrative duties to perform ought to be appointed. When they exercise the function of enforcing the state laws (as sheriffs and prosecuting attorneys do), they should be chosen and paid by the state, not by the county. When they perform county functions (as county treasurers, county auditors, and county clerks do), they should be appointed by the county board or by the county manager.

4. CIVIL SERVICE REFORM SHOULD BE APPLIED TO COUNTIES.

Civil service reform has as yet made scarcely a ripple upon the face of county politics in many of the states, yet selection by merit is a principle which ought to be applied to subordinate positions in the service of the county as in that of the city, state, or nation. Clerks in courthouses, keepers in jails, foremen in road construction, even the janitors in the county buildings are still, in most instances, chosen under the spoils system. The progress of civil service in other fields, moreover, has tended to make the county service a last refuge for the incompetent. Those who cannot pass the examinations conducted by the state or the city fall back on the county and seek political influence to place them on the pay roll there.

5. NEW BUSINESS METHODS ARE NEEDED.

The cities of the United States have made great progress in their business methods during the past twenty-five years. Many of them have adopted new budget systems, improved their bookkeeping and accounting, standardized salaries, and established central purchasing agencies. The counties, taking them as a whole, have not kept pace with all this. Many of them are using methods which the best-governed cities have discarded. For example, some county officers are paid no salaries but are permitted to keep the fees that they collect. In well-governed communities this system of paying officials has long ago been abandoned. In many counties, moreover, each official does his own purchasing, a practice which has also been largely abandoned in the cities. The fifth need, then, is for a general modernizing of the business methods used by county officers.

How may these five reforms in county government be brought about? Presumably in the same way that American cities have been considerably reformed during the past twenty-five years. The legislatures should give the counties the same opportunities for reorganization that many of

them have given to the cities — the opportunity to choose their own form of government, to revise it, simplify it, improve it, and make it more efficient. From municipal experience the counties can learn much if they try. But it will not be enough to provide the opportunity for reconstruction and stop there. The propulsion to reform in city government has not come from the legislatures but from the people. Powerful civic organizations have aroused the voters of the cities, but in the counties there has been no such surge of reform propaganda. It is time for the reformers to concentrate their attention upon this dark continent of American politics.

HOW CAN THESE CHANGES BE EFFECTED?

Special problems of county government arise whenever a large city spreads itself over all, or a great portion, of the county area. This is the situation, for example, in Cook County which contains Chicago, in Philadelphia County which includes Philadelphia, in Cuyahoga County which contains Cleveland, etc. In some such cases, as in San Francisco, Philadelphia, Boston, New Orleans, and Denver, the same body acts as a combined city council and county board, while all or most of the city and county administrative authorities have been consolidated. In other instances, there are separate authorities with powers which overlap and are frequently ill-defined. The city council and the county board are engaged in performing similar functions within the same area. In some instances, the city assessors go around and make their valuations for municipal taxation; a week or two later, the county assessors make their rounds and assess the same property for county taxes. The waste involved in this is obvious. Much would be saved, both in time and money, by making each large city a separate county, letting the regular municipal authorities perform county functions. Such consolidation has undergone a remarkable development in Great Britain, where it is known as the county-borough; and if constitutional and popular objections could be overcome, there are more than one hundred and fifty areas in the United States to which a similar plan might well be applied.

THE SPECIAL PROBLEMS OF METROPOLITAN COUNTIES.

Advantages might also be derived in many cases by the consolidation of two or three small counties into a single large one. The automobile has made many of the smaller units unnecessary. Diminutive counties are a relic of horse-and-buggy days. North Carolina, for example, has 100 counties, while Georgia has 159; Missouri, 114; Kentucky, 120; and Texas, 254. On the other hand, Connecticut gets along with 8, Massachusetts with 14, Wyoming with 23, and Oregon with 36. Many of the smaller counties are poverty-stricken yet attempt to maintain a complete mechanism of government.

COUNTY CONSOLIDATION.

Consolidation of two or more counties would be productive of both efficiency and economy, and during the past twenty years the attempt has been made in various states to bring such consolidations about. But, as yet, very little progress in this direction has been made. Sentimental objections are invariably interposed, and local politicians with a vested interest in county jobs exert a powerful influence in favor of the status quo. Almost invariably, too, constitutional difficulties stand in the way of this and other county reforms.[1] Recently the proposal has been made that instead of outright consolidation, contiguous counties, while retaining their identity for all other purposes, might combine for the purpose of carrying out certain specific functions. This plan, which is widely used by local governments in some European countries and which has already been adopted in Virginia, may secure some support in the future, particularly for the handling of newer and more expensive functions which are being entrusted to counties.

TOWNS, TOWNSHIPS, VILLAGES, AND DISTRICTS

For purposes of local government counties are usually divided into towns, districts, or townships, but whenever any portion of a county becomes urban in character through the growth of population, it is commonly organized as an incorporated village, town, borough, or city. The practice and the terminology are very different in various parts of the country. Towns are the outstanding units of local government in New England; townships are found in the middle states and the north central regions, but not in the southern or far western parts of the country. Villages and boroughs appear here and there without much reference to region. It would require a whole volume to explain the variations of government in them all. So nothing more can be attempted in these pages than a statement of the general principles and a summary description of the more important local units, particularly the New England town and the middle western township.

THE VARIOUS AREAS OF LOCAL GOVERNMENT IN THE SEVERAL STATES.

The details of organization in towns, townships, and villages are wholly within the control of each state. Each state has full power to devise its own system of local government, and to modify this system at will. But although each state is supreme as respects the form and functions of local government, the legislature does not always have a free hand in such matters. The state constitutions contain many limiting provisions which guarantee rights

RELATION OF LOCAL TO STATE GOVERNMENT.

[1] See the report on "Constitutional Barriers to Improvement in County Government" issued as a Supplement to the *National Municipal Review*, XXI, No. 8 (August, 1932).

to the inhabitants of the local areas. And as constitutions are revised, the tendency is to insert more of these restrictive provisions. Within the limits set by the state constitutions, however, the legislature incorporates towns, boroughs, townships, villages, or special districts. It does this by a general code or by special laws. In either case, it determines what officers a community shall have, how they shall be chosen, and what their duties shall be. These duties it changes at frequent intervals, until the whole body of local government law is so voluminous and complicated that even the officials themselves often do not know what their powers are.

HOME RULE FOR SMALL COMMUNITIES.

Of course, there is general agreement on the principle that local functions should be left to these local officers without state interference, but there is no agreement as to where the line between local and state functions should be drawn. In all cases of doubt the state legislature gives itself the benefit. The little red schoolhouse might be deemed a local institution, if anything is; but the state legislature usually determines the qualifications of the teacher who rules therein, how much she shall be paid, and what textbooks she shall use. For education, in the large, is a matter of state-wide consequence. Local government, therefore, is merely state government writ small. Its officials do, in the main, what the state laws tell them to do.

THE NEW ENGLAND TOWN.

Among areas of local government the New England town is the oldest and most interesting.[1] The town is not always, as the name might imply, a thickly settled community. Some New England towns are places with populations running into many thousands, but most of them are what would elsewhere be called townships, for they are agricultural regions covering thirty or forty square miles. One Massachusetts town has a population of over fifty thousand; another has less than three hundred. In Maine, Vermont, and Connecticut, a few villages or boroughs have been incorporated within the limits of the town; but in general this practice has not been pursued. A town remains a town until its people secure incorporation as a city.

ITS LEGAL STATUS.

The New England town does not possess a charter of incorporation, yet it has practically all the rights and privileges of a municipal corporation. Originally, the towns derived their powers from the common law, but since the Revolution it has been a well-settled legal doctrine that they can claim no powers except such as "have been expressly conferred by statute or which are

[1] A good book on the subject is John F. Sly, *Town Government in Massachusetts: 1620–1930* (Cambridge, Mass., 1930).

necessary for conducting municipal affairs." [1] The idea that the New England town forms a sort of miniature republic is widely current, but it is without any legal basis. The New England town is as completely under the thumb of the state legislature as is the western township or any other area of local government.

GENERAL POWERS OF TOWNS.

To some extent the powers now possessed by the towns have been conferred by a general law dealing with town government; but special statutes have also, from time to time, added new privileges or functions. Today the New England town has about the same authority that a city charter conveys. It may sue and be sued, make contracts, levy taxes, borrow money, and own property. It may, by ordinance or bylaws, provide for the protection of life and property, the public health, and public morals. It may build and maintain streets and sewers, provide a water supply, public lighting, police and fire protection, parks and public buildings. It is required to establish schools, and it may maintain a hospital, a public library, and a market. Welfare work is also a town function in New England. The town, in fact, provides many services which in other parts of the country are among the functions of counties.

THE TOWN MEETING.

The chief organ of town government in New England is the town meeting. An annual town meeting is usually held in May, with special meetings whenever necessary, but not more than two or three special meetings are commonly called during the year. Every voter of the town is entitled to attend these town meetings, which convene in the town hall. As a rule, however, not more than half of them do attend, and the percentage is frequently much smaller. The town meeting selects its own presiding officer, who is known as the moderator, and this honor customarily goes to its most prominent citizen.[2]

ITS ORGANIZATION AND FUNCTIONS.

Town meetings are called with considerable formality, and their procedure is strictly regulated by law and tradition. The call is in the form of a warrant issued by the selectmen to the constables of the town commanding them "to notify and warn" the townsmen and to "make due return" of their having done so. The warrant specifies item by item the matters which are to be brought before the meeting and no other business can be considered. At the annual meeting the various town officers are elected for the year, a poll being opened for this purpose whenever there is a contest.

[1] Bloomfield *v.* Charter Oak Bank, 121 U. S. 129.

[2] It is the highest honor that the townsmen can bestow and is appreciated accordingly. Even governors and United States senators do not disdain to serve as moderators at the annual meetings in their home towns.

Usually this polling takes place in the morning, the afternoon being devoted to a business session in which the appropriations are voted and all matters of general town policy settled. In the more populous towns, however, the polling often continues throughout the day, with a business session in the evening. When the warrant contains many items, it is impossible to finish the entire docket of business at a single session, in which case the meeting is adjourned to a subsequent afternoon or evening, and still further adjourned if necessary.

HOW THE SYSTEM WORKS: 1. IN SMALLER TOWNS.

In the smaller rural towns the occasion of the annual town meeting has always been, and still is, a neighborhood holiday. The debate, particularly upon matters which the world would not regard as of momentous importance, is often spirited and piquant, with no dearth of humor and an occasional flare-up of personalities. A town meeting of sturdy farmers has been known to debate for more than an hour a proposal to spend eight or ten dollars in repairing a culvert or a fence. It is a picturesque gathering, this annual meeting in a small New England town, with its copious flow of homely oratory, its insistence upon settling even the smallest details by common voice, its prodigious emission of tobacco smoke, and the general retail of local gossip which takes place around the doors.

2. IN LARGER TOWNS.

But in the larger towns things are quite different. There the business of the town meeting is for the most part cut and dried beforehand; a few active politicians monopolize the debate, and the large amount of business necessitates the strict application of parliamentary rules. In some of these larger towns, moreover, it has become the practice to have the moderator appoint a committee, usually of fifteen or more townsmen, which makes recommendations to the town meeting on all matters in the warrant, and these recommendations are usually adopted.

RECENT CHANGES IN THE TOWN MEETING.

The town meeting ceases to be a satisfactory organ of local government when the population of the town exceeds five or six thousand. When that point is reached, a reasonably full attendance of the voters becomes impractical and the control of the town policy passes into the hands of whatever element happens to be the stronger or more aggressive politically. For this reason many towns, on reaching an unwieldy size, apply for incorporation as cities. Some others, however, have been reluctant to give up local institutions which have served so long, and hence continue a scheme of government which no longer suits their needs. Others, again, have attempted to modify the town meeting without actually abolishing it,

but these halfway measures do not seem to be proving altogether successful.

One modification is to provide for a "limited town meeting." In other words, it is arranged that the voters of the town shall elect say two or three hundred of their own number to constitute the town meeting. These delegates, or representatives, sit at the front of the hall and do all the voting. The rest of the hall, including the gallery, is thrown open to all those who care to attend. Any townsman can speak on any subject at the meeting; but only the delegates are permitted to vote. This arrangement, however, is only a makeshift. There is no practical halting place between direct and representative government. A town meeting must be one thing or the other; it cannot be both.

In the earliest days of seaboard settlement, the town meeting was the sole organ of town government. But it was soon found necessary to have officials who would carry the decisions of the town meeting into effect and who would also deal with minor matters in the intervals between the meetings. Hence developed the practice of choosing at the annual town meeting a committee of the townsmen, usually three or five in number, known as the selectmen.[1] Originally, these selectmen were chosen for one year only, and that practice is generally continued, except in Massachusetts, where the term is three years in many of the towns, one selectman retiring annually. But in any event reelections are common, and a selectman who is willing to serve is frequently continued in office for ten or a dozen years.

THE SELECTMEN.

The selectmen form the executive committee of the town meeting. They have no legislative authority, pass no bylaws, levy no taxes, borrow no money, and make no appropriations. All these things require action by the town meeting. Nor do the selectmen appoint the town officers. Even their administrative functions, although multifarious, are of a subsidiary character. They prepare the warrants for the annual or special meetings; they grant licenses under the authority of the state laws; they lay out highways and sewers for acceptance by the town meeting; they make the arrangements for state and local elections, and they have immediate charge of town property. They usually award the contracts for public work, and all bills against the town for work or services must be approved by them before being paid. Schools are supervised by a school committee elected at the annual town meeting. The selectmen may serve as overseers of the poor, or as assessors, or as the town board of health; but in towns of any

THEIR FUNCTIONS.

[1] In Rhode Island this body is not known as the board of selectmen, but as the town council.

considerable size these functions are entrusted to separate boards, the members of which are also chosen at the annual town meeting. The New England town does not, therefore, possess a centralized executive authority. The selectmen share executive functions with various boards and officials who are not under their control.

OTHER TOWN BOARDS AND OFFICIALS.

The number and nature of these boards and officials depend upon the size of the town. Most of the towns have a school committee or board of school trustees, a board of health, and a board of overseers of the poor. A large town may also have a water board, a library board, and a board of park commissioners. As for administrative officials, every town has its town clerk, who is perhaps the most important among local officers. Many functions are placed upon him by state law, such as the issuing of marriage licenses, the registration of births and deaths, the transmission of various reports to the state authorities, and in some states the recording of deeds and mortgages. In addition, the town clerk is the keeper of the local records and the general factotum of the selectmen. He is elected by the town meeting, receives a salary, and is usually continued in office so long as he does his work satisfactorily. Each town also has its assessors, its town treasurer, its constables, and often a considerable list of minor officials, such as poundkeepers, fence viewers, sealers of weights and measures, etc. These officers are usually chosen by the town meeting, but in some towns the selectmen appoint to the minor posts.

WHY SO MANY OFFICIALS?

One reason for this multiplication of administrative boards and minor officials, even in towns which have relatively small populations, may be found in the fact that most town officers serve without pay. If the work were concentrated in a few hands, there would be a demand for remuneration. In the smaller communities this plan of administration by scattered and unpaid agencies serves well enough and has the merit of cheapness; but in the larger towns, where there is much public business to be done, it falls far short of the requirements and has had to be in part abandoned. These places, as a rule, are now putting paid officials in charge of the more important services. In general, therefore, the New England system of town government, with three centuries of good tradition behind it, is gradually giving way before the march of industrialism and urbanization. It served well in early days as a cradle of democracy, but it is not adapted to the needs of a populous community anywhere.

Townships, as areas of local government, are important in the middle western states. In some of them the territory is mapped out into uniform blocks, six miles square. The surveying was done when these regions were

territories under the jurisdiction of Congress, hence the divisions are sometimes called congressional ownerships. In some of these states, the township meeting is an institution of local government, but it has not developed much vitality,[1] and its chief function is that of electing the township officers. In other states, there is no town or township meeting, the work of local administration being wholly carried on by officers elected at the polls.

TOWNSHIPS IN THE MIDDLE WESTERN STATES.

The administrative work of township government is carried on either by a board of trustees or by a single officer known as the supervisor. Where the board system prevails, there are different ways of constituting the board, although its members are always elected by the voters. The powers of the board also vary from state to state. So it is with the single supervisor, an elective official, whose functions are more extensive in some of the states than in others. Towns and townships also have their clerks, treasurers, assessors, constables, highway overseers, justices of the peace, and other local officials, all or most of them elected.

THE ORGANS OF TOWN AND TOWNSHIP GOVERNMENT.

Township government has been greatly weakened by the practice of incorporating as a separate municipality any portion of the township which becomes urban in character. Nearly all the states now make provision by general law for the organization of these thickly settled areas under the name of villages, boroughs, incorporated towns, or cities. The usual course is for the inhabitants to present a petition to some designated officer, who submits the question of incorporation to a vote of the people, and if they decide affirmatively, the petition is granted. The region is thereupon incorporated as a village, borough, town, or city, as the case may be. Usually there is a minimum requirement as to population: from two hundred to three hundred in the case of a village, from two thousand to twelve thousand where the petition is for incorporation as a city.

THE INCORPORATED MUNICIPALITIES, VILLAGES, AND BOROUGHS.

When a region is thus incorporated, it passes from the jurisdiction of the township officers and sets up its own local government. In the case of a village, this government commonly consists of a board of trustees or a council with from three to nine elected members, together with a chief executive officer, called a mayor or village president, who is either chosen by the trustees or by the village voters. In the case of a borough, an incorporated town, or a city, the organization is along somewhat the same lines; but the governmental mechanism is more elaborate. The general

[1] The chief reason for this, no doubt, is the purely artificial nature of the township. It has no social homogeneity or local self-consciousness like the New England town. By incorporation, moreover, the thickly settled portions of townships are usually organized as cities or villages, thus breaking into the original unit.

laws of each state provide what powers these local governments shall exercise, but they generally include the making of bylaws, the management of streets, water supply, sanitation, police, fire protection, and public recreation. Taking the United States as a whole, there are more than ten thousand of these small incorporated municipalities. They differ so widely in size, population, form of government, and functions, that no general description will hold strictly true in relation to all or even to any large number of them.

THE COUNTY DIVISIONS IN SOUTHERN STATES.

In the southern states, the county remains the dominant area of local government. There are no towns as in New England, and only in scattered regions any system of organized township government. Instead of townships, the counties frequently maintain special divisions for such purposes as the management of schools, the building of highways, the holding of elections, and the administration of justice. These county divisions are not corporate entities, like towns or townships; they have no taxing power and they exist for certain designated purposes only. In some southern states, they are called magisterial districts; in others, the name township is used, although the term is misleading.

THE INCORPORATED DISTRICTS IN STATES OF THE FAR WEST.

In the far western states, the system of incorporated districts has become general. There, it is a common practice to divide the county into school districts, sanitary districts, flood-control districts, irrigation districts, fire-prevention districts, park districts, and road districts, each for the purpose indicated by its name. Each elects its own district trustees or other officers when necessary. The county remains the chief unit, but its authorities cannot conveniently carry out all the work that needs to be done, hence a division into districts is made for individual functions. These districts are commonly known as "quasi-municipal corporations" to distinguish them from regular municipalities such as cities, towns, and townships. But they have power to tax, power to borrow, and most of the other powers which municipal corporations possess. In some cases they overlap one another and create serious confusion in tax rates.

THE RARE MOSAIC OF LOCAL AREAS.

One can sometimes find, therefore, a strange welter of local areas within the bounds of a single state. Illinois, for example, has 102 counties, 1,138 incorporated places, 1,436 towns and townships, 12,129 school districts, and, in addition, no fewer than 824 road districts, sanitary districts, improvement districts, and districts of other varieties. Thus, there are more than 15,000 separate governmental units in this one state. Give them, on an average, only twelve or fifteen officials apiece (Cook County alone has over 2,600), and

you have a quarter of a million officers of local government — one for every ten adults in the population of the state.[1] In Los Angeles County, California, there are more than eighteen hundred governmental units for which taxes are levied.

LOCAL GOVERNMENT AND DEMOCRACY.

Local democracy is the foundation of national democracy. But the democracy of a government, whether national or local, is not to be judged by the number of officials whom the people elect or the number of governmental units in which the people do the electing. Too many officials, too frequent elections, too much parceling of powers and functions — they all tend to subvert democracy by placing authority in the hands of an invisible monarch known as the local "boss," who lords it over them all. Popular control of local government, in thousands of rural communities throughout the United States, has become a mirage. It is devoid of reality. The state legislatures, in many instances, have burdened these counties, towns, townships, villages, and districts, with a tangle of officials, boards, and functionaries, far beyond any conceivable need; they have cluttered up the states with such a labyrinth of political subdivisions that not even an expert knows just who governs him. Official responsibility to the people has in this way been seriously impaired and sometimes reduced to the vanishing point. The way to improve local democracy is to have a simpler structure of local government with fewer elective officers, with larger authority, and with a more direct responsibility for its exercise.

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CHAPTER XLIX

THE AMERICAN PHILOSOPHY OF GOVERNMENT

Nothing appears more surprising, to those who consider human affairs with a philosophical eye, than the ease with which the many are governed by the few. — *David Hume.*

The study of American government must be primarily concerned with facts; because the true character of a government is determined by its practices rather than by its philosophy. Accordingly, this book has devoted most of its pages to the task of setting forth the actualities of the American political system. As in every other scientific exploration, the study of government should begin by laying hold of the visible phenomena. With these in hand it should proceed to the uncovering of facts which are not so plainly in sight. An acquaintance with the realities should thus precede, rather than follow, any discussion of the philosophy on which American government is assumed to be based. The design can be better understood after a careful inspection of the structure.

FIRST IN IMPORTANCE COME THE FACTS OF GOVERNMENT.

Yet the design of a government, in other words, the philosophy underlying it, is by no means unimportant. It exerts a continuous and considerable influence upon the workings of the political mechanism. And political theories, or points of view, have unquestionably had a large part in directing the evolution of American government. They have been in the back of men's minds during every discussion of governmental organization and methods. The American citizen has a philosophy of government, and it gives a very definite cast to his political thought, although its principles are not always clear in his own mind. To the extent that the citizen gets hold of them, however, they become mental stereotypes and influence his attitude on all questions of public policy. These principles, when taken together, formulate a creed to which the citizen gives a more or less consistent allegiance, in spite of his realization that some of its contents no longer fit the times or the circumstances.

THEN THE PHILOSOPHY.

In other words, the thought of the people is heavily colored by a

political fundamentalism. Certain formulas of free government are accepted as gospel by the great majority of Americans without much regard to their rationality. If you have doubts on this score, just propose some new governmental device such as the establishment of an intelligence test for voters. In the great majority of instances, your proposal will not be listened to and discussed on its merits. It will be met with the retort that such a thing would be un-American, undemocratic, a violation of the principle of human equality on which the nation was founded. That is to say, your proposal clashes with something in the set of principles which make up the political philosophy of the average American. What are these principles? Sixteen of them will be enumerated, but this does not exhaust the entire list.

FUNDAMENTALISM IN POLITICS.

First among the various fundamentals of the American political philosophy is a settled belief in the superiority of the republican form of government. On this point there is virtual unanimity among the American people. In European republics one can often find a group of people persistently urging a change to a monarchical form of government. In France, for example, there was a vociferous royalist faction throughout the entire republican period from 1871 to 1940. Monarchical restoration also had its partisans during the period of the Weimar Republic in Germany (1919–1933), in republican Austria after the First World War as well as in Spain during more recent years. From time to time it appears in other European states where republican institutions are thought to be well established. But in the United States, there has been no royalist faction since the federal Constitution went into effect. The country has been at all times well united in its allegiance to republican ideals.

THE CHIEF PRINCIPLES IN THE AMERICAN PHILOSOPHY OF GOVERNMENT:

1. A REPUBLICAN FORM OF GOVERNMENT.

But what does the average American understand by a republican form of government? The essentials, as he understands them, are a chief executive chosen by the people, either directly or through their representatives, and an elective lawmaking body. Most Americans do not look upon any government as republican in form unless the people elect and control both branches of it, executive and legislative. Where the legislature is composed of two branches, moreover, the popular control must extend to both branches. An hereditary chamber, even though it be secondary to the elective branch of the national legislature, is regarded by Americans as unrepublican.

WHAT THIS EXPRESSION MEANS.

Consequently, the average American mind identifies a republican form of government with democracy. A monarchy, no matter what its character or limitations, seems difficult to reconcile with popular or democratic government in the New World mentality. Nevertheless, Great Britain, although a monarchy, has a closer affinity with American republicanism than with the nominally republican governments which many other countries maintain. To overlook that fact is to let ourselves pass into the bondage of terminology. It is a way of demonstrating how words and phrases have the power to muddle thought. The old-time classification of governments into monarchies and republics can perform little service nowadays except to mislead, because everyone knows that a government may be republican in form without giving the masses of people any substantial measure of control over it. That has been repeatedly demonstrated in some of the republics of Central and South America, as well as in Spain, Portugal, China, Turkey, and other countries which call themselves republics. On the other hand, a titular monarchy may be thoroughly republican in all the true essentials of popular participation in government, as is the case with the various dominions of the British Commonwealth. The vital distinction is not between republics and monarchies, but between governments which conform to the democratic principle and those which do not.

ITS IDENTIFICATION WITH DEMOCRACY.

Conformance with the democratic principle requires that the popular will shall be made manifest by the action of all those who are politically competent. To put this in simpler form, it means government under the "control of the people," not the whole people, but of those who ought to have the right to vote. Democracy is thus, to some extent, a matter of degree and raises the question of political competence. The United States was regarded as a democracy even when women were excluded from the electorate. Americans look upon Switzerland as a democracy although women are still excluded from voting privileges there. A government is deemed to be democratic whenever its electoral basis is sufficiently broad to permit at each election a fair portrayal of the general will. Democracy may be either representative, or direct, or it may be a combination of both. The American national democracy is representative. It functions wholly through elective and appointive officials. State and city governments in the United States are also representative for the most part, but in some cases they make provision for direct action on the part of the electorate by means of the initiative, referendum, and recall. To that extent they are direct, as well as representative democracies.

2. A REPRESENTATIVE DEMOCRACY.

Government rests upon the consent of the governed. That proposition embodies an important article in the American political creed. The consent of the governed is attested by a written constitution which forms the basis of government. The purpose of a constitution is threefold: to set up a government, to endow it with powers, and to circumscribe it with limitations. A constitution determines what the governed have consented to let their government do. Hence, both the national and the state constitutions of the United States guarantee the citizen certain fundamental rights and endeavor to protect him against the abuse of political power. It is a consensus of opinion among Americans that such written guarantees are desirable, and even essential, to prevent the oppression of the few by the many; in other words, to preclude despotic action in individual cases under the guise of majority rule. The idea is that the people shall first agree with due deliberation upon the fundamentals, irrespective of specific cases, and then require that these shall be strictly observed by all the governing authorities without exception.

3. WRITTEN CONSTITUTIONS AS THE BASIS OF GOVERNMENT.

Since a constitution is the supreme law, it follows that legal sovereignty is synonymous with the power to make and unmake the constitution. The legal sovereign is that authority which can enforce its will to the exclusion of all other wills. Offhand it is frequently said that sovereignty in the United States "rests with the people." This statement, while broadly accurate, is not sufficiently informative. Legal sovereignty, in the United States, is not vested in the hands of the people directly. The people, by majority vote, cannot change the national Constitution. Changes must be made through the elective representatives of the people in one of the four ways which the Constitution prescribes.

4. POPULAR SOVEREIGNTY.

In the parlance of a constitutional lawyer, therefore, it is quite correct to say that there are no limits on the powers which may be exercised by a two-thirds majority in both Houses of Congress and a majority in both chambers of thirty-six state legislatures when they act in concurrence. But the action of Congress and of the state legislatures in thus amending the supreme law of the land is expressive of the popular will. These bodies are simply the agencies through which the will of the people is promulgated. Sovereignty does not, therefore, reside with them; it rests with the power which stands behind them and provides the momentum. Popular sovereignty does not cease to be real because it must function through designated channels.

Yet there are limitations upon the sovereignty of the people. The form and spirit of a government are not entirely matters of human plan and

program, subject to no forces which are beyond the power of the electorate to control. Man's unfettered will is not the sole determinant of political institutions. There must be laws which govern human volition, for all nature is governed by law. Everything in nature inclines to move in seasons, or in undulations, or in cycles. Day and night, winter and summer, seedtime and harvest, follow the course of the sun in the heavens; while prosperity and depression, conservatism and radicalism, courage and caution, follow each other with almost cyclic regularity. Surely there must be forces affecting and controlling the popular will in a universe which is everywhere else controlled!

LIMITATIONS UPON IT.

"Before the sea of human opinion, as on the shore of the ocean," wrote Sainte-Beuve, "I admire the ebb and flow. Who shall discover its law?" We speak of the unpredictability of the popular will because no one has as yet discovered the laws which mould and control its course. Everyone knows, however, that geographic and cultural conditions have been influential factors in determining the course of political evolution in the past. Everyone also knows, or ought to know, that eras of economic depression have a profound influence in moulding the character of governments by forcing them to assume powers which the people would not have permitted them to acquire in normal times. And having once possessed themselves of emergency jurisdiction, all governments strive to retain it permanently.

POLITICAL DETERMINISM.

Systems of government, therefore, do not entirely depend for their success or failure upon the wisdom of either the governors or the governed. Many factors which are beyond human control operate to make the maintenance of popular government easy or difficult. Geographic isolation is one of them. It has helped nations to keep out of wars and thereby permitted orderly political development. So the saying that the people freely determine their form of government does not always square the truth. Sometimes the choice is (in part, at least) determined for them by circumstances. The people of a country do not choose, for example, whether they prefer to have a written or an unwritten constitution. If an "unwritten" constitution has not been handed down to them from the ages, as in England, they have no alternative but to provide themselves with the other kind. So what we call popular sovereignty reduces itself in some instances to the determinism of time and place and circumstance.

Americans, as a people, have been traditionally afraid of concentrated political authority. This explains their steadfast belief in the principle

that power should be split up and divided around. First of all, it is divided between the nation and the states. The states have rights, and these rights must be respected by the national government. Similarly, the states must leave the national government supreme within its own field. One must not interfere with the other. The supposed advantage of this arrangement is that it prevents any one government from becoming too strong. When the national Constitution was framed, there was a widespread fear that it would become too powerful and ultimately transform the states into mere administrative divisions of the Union. This fear persisted for many years after 1787. Most of it has now passed away, although ardent champions of states' rights still sound the tocsin from time to time. With virtual unanimity, the people of the United States remain convinced that power should continue to be divided between the state and national governments, but they are no longer afraid of shifting authority from the states to the nation, when the public interest seems to demand such transfers.

5. DIVISION OF POWER BETWEEN THE NATION AND THE STATES.

In other words, the American philosophy of government retains its allegiance to federalism, but not to any particular brand of federalism. Every thoughtful American realizes, of course, that to abolish the state governments and concentrate all governmental responsibility in Washington would involve excessive centralization. The mechanism would break down of its own sheer weight. On the other hand, it is equally apparent that the scattering of too much power among the states is likely to cripple the national government's endeavor to cope with nation-wide problems in an effective way. So the old line of demarcation between the two sets of governmental powers is being gradually moved upward. The country is drifting in that direction slowly but steadily. For good or ill we are relaxing the emphasis on federalism, state sovereignty, states' rights, and local self-determination, in favor of nationalism, national policy, and centralized power.

THE GROWING CENTRALIZATION.

It is a widespread, although by no means an unanimous, popular belief in the United States that power should not only be divided between the nation and the states, but that within each government one branch should serve as a check upon the other. It is in accordance with this principle of counterpoise that the American national and state governments are organized. The executive, legislative, and judicial branches are kept, to a large degree, separate and independent of each other. The President's veto serves as a check on Congress; the Senate's authority to

6. THE PRINCIPLE OF CHECKS AND BALANCES.

confirm appointments and to ratify treaties is intended to serve as a limitation on the President; while the Supreme Court's right to declare laws unconstitutional operates as a balance wheel for the elective branches of the government. The entire structure of American government, in fact, is based upon the idea that if a government is given free rein, it will become oppressive, and that if individual officeholders and officers are given the opportunity, they will abuse their powers. They will go forward until they reach their limit, wherever it is. Hence, power should be an automatic counterpoise to power. Sometimes, perhaps, this check is too effective, and delays the operations of government; but it is a measure of safety, and most Americans believe it a wise one in spite of its defects.

IS IT LOSING GROUND?

Nevertheless, there are signs that the principle of checks and balances is beginning to lose its traditional popularity. The past few years have seen legislative powers of vast and far-reaching consequence handed over by Congress to the President, with no such nation-wide chorus of popular protest as such action would have inspired a generation ago. The authority of the governors has similarly been growing at the expense of the state legislatures. In a word, the old balance is being disturbed, and the checks are being weakened. This is because the people seem to have lost, in large measure, their old-time fear of executive dictatorship. For the moment, at any rate, they are more interested in leadership than in deliberation, more concerned about having an efficient government than disturbed by the danger of not having a safe one. The American Republic is today the only great government which retains the principle of checks and balances. If the steady expansion of executive authority continues, it may not retain that distinction very long.

7. A GOVERNMENT OF LAWS, NOT OF MEN.

Most despotisms have been created through the placing of rulers above the law. Laws are known and certain, while the will of a ruler is uncertain and subject to the vagaries of human nature. It cannot be foretold in advance. Therefore, it is a tradition of American government that the laws should not leave to executive discretion anything more than is absolutely essential. "A government of laws, not of men" is the way John Adams phrased it. Of course it is not possible to have a government of laws alone — because laws do not promulgate, or interpret, or enforce themselves. Action on the part of public officials is necessary for their just application. Action on the part of judicial officers is necessary in order that the laws may be interpreted and enforced.

In some European countries, it is the practice to enact the laws in

general terms, leaving the details to be filled by executive orders. Such methods have hitherto been repugnant to the American philosophy of government because they bestow upon individual officers too much discretion, and individual discretion opens the door to uncertainty, favoritism, and injustice. Nevertheless, and in spite of the government-of-laws tradition, both the national and the state political systems in the United States have been moving steadily towards a government of men. Laws are being enacted in broad language, after the European fashion, leaving all details (and sometimes details of supreme consequence) to be supplied by the issue of executive orders or by the rulings of administrative boards. Executive and administrative latitude has been widening year by year. This is inevitable because the more complicated a civilization becomes, the more essential it is to broaden the range of official discretion.

ONE RESULT OF IT.

Meanwhile, the belief of the American people in a government of laws has resulted in an outpouring of legislation such as the world has never seen before. Faith in the remedial efficacy of law is more deeply rooted in the United States than in any other country. There are millions who seem to believe that their fellow men can be made rich or righteous, industrious or intelligent, productive or patriotic, by the alchemy of statutes and ordinances. When the average citizen sees anything amiss, his first impulse is to suggest that "There ought to be a law —." Hence, there are laws and ordinances relating to almost every detail of American life, from the length of freight trains to the brevity of bathing suits. But the zeal of the American democracy for the making of laws has been matched by a rather indifferent success in enforcing them. The public imagination is slow to realize that when a law is enacted, the job is only half done, or less than half done.

8. JUDICIAL REVIEW.

In Great Britain, the lawmaking body is supreme. It has the last word. In that country, the legislature is still officially known as "the high court of parliament." It is both a supreme legislature and a supreme court, consequently there is nothing superior to an act of parliament. When a statute has been enacted by parliament and has received the royal assent — which has now become a mere formality — no court can declare it unconstitutional. But in the United States, the national Constitution is superior to all lawmaking authority, whether in the nation or the states, and the Supreme Court has assumed the function of nullifying any law which contravenes it. This right of the courts to examine into the constitutionality of all laws is an outstanding feature of American government. It arises from the fact that both the nation and the states have adopted written constitutions

which contain limitations upon the powers of lawmaking bodies. Obviously, a written constitution would not be obeyed if there were no authority to enforce obedience, and the courts are the logical agencies of legal compulsion. Constitutions without courts to compel their observance would be mere scraps of paper. Hence, the doctrine of judicial review has become an essential cornerstone of the American political system.

The objection is frequently raised that this practice of judicial review gives the courts too much authority. And if it were true that the Supreme Court could arbitrarily set aside national laws at its own discretion, this would assuredly constitute a species of judicial despotism. But no court ever nullifies a law for the mere reason that the judges consider it unwise or unreasonable. They declare a law invalid only when, in their judgment, it infringes some constitutional provision, and they exercise this power in accordance with a judicial procedure which is designed to afford safeguards against arbitrary action. One should remember that what the courts enforce is the popular will as expressed in the law — the supreme law. They serve as the umpire between the conflicting claims of the nation and the states. There is no way in which a federal system of government can be successfully operated without a judicial umpire, or, if there is, no one has ever discovered it. There must be some high authority vested with the function of seeing that the rules are observed in the inevitable competition for power.

9. EQUALITY BEFORE THE LAW.

Back in the eighteenth century, when the Constitution of the United States was framed, privileged classes existed in most countries of Continental Europe. In France before the Great Revolution of 1789, for example, the nobility and the clergy had all sorts of special rights and immunities. Even in England, there were certain special privileges which members of the peerage enjoyed by law. The founders of the American political system took measures to forestall, so far as practicable, any such class discrimination in the United States. To the extent that the laws can prevent it, no class or creed or section in the United States has any special privilege. They are equal before the law.

It is true, of course, that people cannot be made equal in fact. Neither laws nor constitutions can avail to accomplish this. For it is the order of nature that human beings shall differ in physical strength, intelligence, industry, wealth, and general capacity. No ordinance of man, accordingly, can succeed in making all citizens equal, or keep them equal, in competence and resources. But a constitution can make them equally subject to the laws of the land and can place them equally within the

jurisdiction of the courts. That is what Thomas Jefferson probably had in mind when he wrote of equality as "the denial of every preeminence but that annexed to legal office, and particularly the denial of a preeminence by birth." Equality, to the American mind, is a juristic concept, to be interpreted in connection with the democratic theory of equal justice and a square deal before the law. It is the declaration of an ideal, not a state of affairs. It is not something that exists, but something to be labored for.

EQUALITY AND SECURITY.

Equality, in recent years, has been to some extent confused with security. Economic inequality, as represented in the public imagination by capital on the one hand and labor on the other, is being widely regarded as a mainspring of economic insecurity. Accordingly, there are those who think that the poor can be made rich by the simple device of making the rich poor. If that could be done, the world would have learned the art long ago, for it has tried the experiment many times. Economic equality, or anything approaching it, cannot be achieved except by the sacrifice of liberty. Political and legal equality, however, can exist, despite variations in economic status, provided the latter be not too wide. This proviso is important, for those who possess the wealth of a nation will rule it in the long run. A reasonably wide distribution of wealth and property is therefore a hostage for the protection of political and legal equality.

10. TRIAL BY JURY.

The dogma of legal equality provides a groundwork for the jury system. The great majority of Americans regard the jury as an indispensable bulwark of civil liberty, although they appreciate the fact that the system of trial by jury does not always operate satisfactorily — and indeed many of them try to avoid jury service. Nevertheless, even those who get themselves exempted from such service oppose all proposals to abandon or even restrict jury trials. Their intuition serves to tell them that the requirement of trial by jury is the most dependable of all formal safeguards against the abuse of governmental power. It gives every person the privilege of proving his innocence or establishing his civil rights before a group of his fellow citizens drawn by lot from among his own neighbors. Thus it makes legal equality real. Oppressive laws may be enacted by legislatures, but such laws cannot be enforced unless juries are willing to cooperate, which is another way of saying that oppressive laws cannot be enforced unless the people approve their enforcement. A jury is merely a small cross-section of the electorate and reflects the popular will with a good deal of fidelity. Hence, lawmakers must always keep in mind the fact that no statute can be made effective if juries believe its provisions to be unreasonable or arbitrary. In a word, the jury system helps to keep law in

tune with public opinion. It provides a link between the judicial hierarchy and the electorate.

11. UNIVERSAL SUFFRAGE AND THE SECRET BALLOT.

The people of the United States have committed themselves to the principle that adult citizens of both sexes (with certain restrictions as to residence and literacy) shall be entitled to an equal vote at all elections. This is a relatively recent article in the political creed of the American people, but it has come to stay. There is no likelihood that the country will ever see a return to property qualifications or to manhood suffrage. On the contrary, it is not improbable that there may be an extension of the suffrage to persons under twenty-one years of age. In one state (Georgia) the minimum age for voting is now fixed at eighteen. Universal suffrage means that nearly half the total population is eligible to be enrolled as voters, which makes the American electorate the largest single electorate in the world. It is so large that only a portion of it really understands most of the complicated issues which come up for decision at the polls.

The electorate controls the government through the pressure of public opinion and by periodically using the ballot. It is an accepted principle in the United States that a voter shall have one vote only and that the ballot which he uses shall be a secret one. But it is not yet a generally accepted rule that the ballot shall be short, simple, and intelligible, as well as secret. The process of government has been protected against intimidation but not against electoral helplessness. Proportional representation, which made such striking progress in European countries after the close of the First World War, has as yet gained no considerable foothold in America. This is partly because political minorities in the United States do not urgently feel the need of it as a protection, and partly because the procedure used in counting the ballots under a proportional representation system is somewhat bewildering to the average citizen. The plan has been tried at municipal elections in a number of American cities during recent years; but some of these cities have discarded it after a trial. In any case, it is not adapted to use in national or state elections where only one candidate is usually chosen from each district.

12. NO ESTABLISHMENT OF RELIGION.

In some European countries, there is an "established" church, that is, a church which is officially recognized. This established religion sometimes receives financial assistance for its churches or its schools out of the public treasury. In a few instances, the connection is so close that the higher officials of the church are appointed (or their appointments are confirmed) by the national government. This is the case in England. All such interlocking of political and ecclesiastical organization is regarded by most Americans as detri-

mental to the best interests of church and state alike. Hence, a separation of the two has been maintained in the United States since the Revolution. The national Constitution forbids any establishment of religion by action of Congress, or the passing of any law which limits the free exercise of religious belief, or which sets up any religious test for the holding of public office. The principle of religious toleration is thus embedded in the supreme law of the land and may not be infringed upon by any action of the national authorities. Most of the state constitutions contain similar provisions as a limitation upon the powers of their legislatures. In these states no religious body may be given special privileges which are denied to other such bodies, and no public funds may be appropriated for sectarian purposes.

13. LOCAL SELF-GOVERNMENT.

There are two general methods of organizing the government of local communities. One is to make all such governments uniform in plan and to place them under the control of the central authorities. This was the arrangement in France during the Third Republic (1870–1940). All communes (that is, all villages, towns, and cities, with the exception of Paris) were given the same general framework of local government and then held under the rigid supervision of the national authorities. Local government in France thus resembled a pyramid with local authorities forming the base and the highest national authority forming the apex.

The other method of organizing local government is to require no general uniformity, but to allow each county, town, or city to endow itself with whatever form of government it may see fit. Under this plan of unstandardized local organization, every community is accorded a large measure of freedom in the administration of its own affairs. This concept of local self-determination gained its first general acceptance in England and was brought to America in colonial days. There it quickly gained a foothold in the Virginia county and the New England town, whence it spread throughout the entire country.

The American philosophy of government still leans strongly toward this principle. It accepts, in general, the proposition that people should be allowed to administer their own local affairs in their own way. The presumption is against rigid supervision from above. But local self-determination must necessarily be limited by regulations made in the general interest, for no community lives by itself in these days of closened contact. Each comes into daily touch with other communities whose interests may be adversely affected by a misuse of local freedom. Conflagrations and epidemics do not stop at town boundaries. Laxity in one village or town may visit unmerited penalties upon its next-door neigh-

bors. For that reason each community cannot be permitted entire self-decision in the matter of protecting itself against fire or disease. Local home rule is a worthy ideal, and the burden of proof continues to be upon those who advocate a departure from it; but with the interlocking of urban communities, the obstacles to it are increasing.

14. GOVERNMENT BY POLITICAL PARTIES.

Although political parties are not mentioned at all in American constitutions, and are rarely mentioned in the laws, they ramify deeply into all the practical aspects of government and profoundly influence the citizen's attitude towards it. Parties originate in the differences of opinion which necessarily arise concerning political questions; but they secure their direction, and most of their momentum, from economic issues. If all men had the same worldly interests, it would be difficult to maintain party organizations as we now have them. The desire to secure, or to preserve, economic advantages is a strong and continuing impetus to party strength.

Americans as a whole believe in the two-party system, and most of them hold to the fiction that the two major parties reflect fundamental differences in the political convictions of the people. This, however, the major parties have ceased to do. Both of them are now wholly dissociated from their original professions of political belief. Today they are mottled composites of opinion based on tradition, inheritance, race, religion, occupation, or locality. The English historian, Macaulay, once declared that the natural division of men lies between those who want to hold back and those who want to push forward; in other words, that all men are by nature reactionaries or progressives, conservatives or liberals. This is probably true, yet the major political parties have not followed any such line of cleavage in the United States. There are reactionaries in both of them, and progressives in both. The party label gives no clue to the wearer's point of view. Hence the assumption that party government gives the voter a choice between alternatives is by no means well-founded in America. In the United States, the political issues do not create the parties, as in European countries: the parties create the issues, or seize upon popular ones as a means of getting into power. The American philosophy of two-party government does not square with the current actualities. For this reason, there are some who believe that there should be a realignment of parties, discarding the old traditions and establishing a new division based upon the natural cleavage between conservatives and liberals. Logic would dictate such action, no doubt, but logic does not have a dominating influence in politics. Habit is a stronger determinant of political action, especially when it has been continued for several generations.

The social order which has traditionally existed in most countries of the world is known as economic individualism, or the capitalistic system, to distinguish it from the various forms of collectivist organization, including national socialism and communism. Under an individualistic social order, most of the property in a country belongs to individuals, or to groups of individuals known as corporations; under a collectivist organization of society, the agencies of production and distribution belong to the community — they are not owned by individuals or corporations, but by the whole people. Under the totalitarian systems of government which came into being in Italy and Germany between the two World Wars, private property and private enterprise were retained in form; but both were placed under so large a measure of governmental restraint that individual ownership became little more than a fiction. In Soviet Russia, operating under a communist system, "private" property was taken over by the state and only "personal" property was allowed to individuals. According to the Russian differentiation between these two terms, personal property includes things which an individual acquires through his own earnings or savings for his own personal use — a home, an automobile, furnishings, even luxuries — all of which an individual is permitted to own. Private property, on the other hand, is assumed to mean factories, shops, rented houses, bonds, stocks, and all other property which can be "used to exploit the labor of others." The distinction between personal and private property, however, cannot always be kept sharp and clear.

15. ECONOMIC INDIVIDUALISM.

Individualism and private property have always formed the basis of the social and economic organization in the United States. The whole economic structure rests upon it, and our political philosophy has adjusted itself to this arrangement. The national Constitution requires that no person shall be deprived of life, liberty, or *property* without due process of law. This sense of security, this assurance that what a man earns and saves shall be his own, not to be arbitrarily taken away from him for the benefit of others less industrious or thrifty — this guarantee has been the foundation of the American economic system since the beginning.

ITS CONSTITUTIONAL BASIS.

But the right of private property has never been looked upon in America as an absolute right, a right which a man may use to the detriment of others. Rights of private ownership are subordinate to the public interest. The ownership of property by individuals can be justified only if the owners regard themselves as trustees for the common well-being. In earlier days

LIMITATIONS UPON IT.

there was a strong presumption against any interference with private property or business, and the national tradition still tends that way; but during more recent years, the old sanctity of private ownership has been losing a good deal of its grip on the public imagination. The government, as the representative of the public interest, has been encroaching upon private property and freedom of contract through the broader exercise of its taxing and police powers.

The United States has been slowly swinging away from its extreme attachment to individualism and has been placing various erstwhile private enterprises under public control, but it has not yet gone nearly so far as the countries of Continental Europe. Banking and the issue of securities have been brought under rigid governmental supervision; the same is true of the railroads, the public utilities, and the insurance companies. By the congressional legislation of recent years, an attempt has been made to establish a degree of control over the operations of agriculture and industry far exceeding anything previously known in the United States. This attempt bears witness to the gradual weakening of the old economic philosophy.

Finally, it has been a cardinal principle of the American faith that the nation should avoid becoming involved in the vicissitudes of Europe by keeping clear of entangling alliances or even international understandings of any sort. On the other hand, it should stand firm against any interference by European countries in the affairs of the Western Hemisphere. Not even the involvement of the United States in the First World War materially weakened the faith of the American people in this traditional policy. This was demonstrated when the country refrained from joining the League of Nations and refused to accept the protocol of the World Court. Towards the end of the 1930's, even as war clouds once more gathered ominously on the international horizon, Congress passed neutrality legislation in the futile hope that, if a world struggle again occurred, the United States could keep out of it.

16. ATTITUDE ON INTERNATIONAL AFFAIRS: ISOLATIONISM VERSUS A WORLD ROLE.

Now that the nation has been given its second lesson, the people of the United States have come to realize the impossibility of remaining at peace while the rest of the world goes to war. The world has now become too small, and the United States too powerful, for any such hope to be realized. There is every indication, therefore, that the American philosophy with reference to foreign affairs will undergo a considerable change. Whatever we might desire the country's course to be, if circumstances permitted, no thoughtful American can blink the grim fact that twice within a single genera-

THE NEW ORIENTATION.

tion his country was drawn into a world conflict through no fault of its own. Having paid so great a penalty on these two occasions, it is not surprising that the mind of the people with respect to the interest of America in foreign affairs has undergone a change.

IN CONCLUSION.

Every government rests on the faith of its people. The foregoing outline of a political creed does not exhaust the category of principles in which the American citizenship believes. There are others which will readily suggest themselves to anyone who gives the matter a little thought. As a philosophy of government in the twentieth century, it leaves a good deal to be desired; on the other hand, it will stand comparison with that of any other country. Measured by the results of its application to the rulership of more than a hundred and thirty million people, it is by no means to be ranked as a Cinderella among confessions of political faith. Yet no nation should commit the folly of regarding any principle of government as rigid and unchangeable for all time. Principles, like methods, should be modified as circumstances require. Theories should be drawn into articulation with the facts. For government is a going concern, maintained for the benefit of the governed, and not as an end in itself.

A FINAL QUOTATION — FULL OF WISDOM.

"Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce and honest friendship with all nations — entangling alliances with none; the support of the state governments in all their rights, as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad; . . . freedom of religion; freedom of the press; freedom of person under the protection of the habeas corpus; and trial by juries impartially selected — these principles form the bright constellation which has gone before us and guided our steps." These words of Thomas Jefferson, as uttered in his first inaugural, embody a nugget of prophetic sagacity which Americans would do well to treasure. They state a political creed which, for the greater part and in all its fundamentals, should still satisfy those who seek the noblest and the best in American political life.

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APPENDIX

CONSTITUTION OF THE UNITED STATES

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes [1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[1] See the sixteenth amendment, *below*, p. 849.
[2] Partly superseded by the fourteenth amendment, *below*, p. 848.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.[1]

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[2]

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December,[3] unless they shall by law appoint a different day.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a

[1] See the seventeenth amendment, *below*, p. 850.
[2] *Ibid.*
[3] See the twentieth amendment, *below*, p. 850.

quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of ad-

journment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.[1]

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

[1] See the sixteenth amendment, *below*, p. 849.

ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[1] The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[2]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the

[1] The following paragraph was in force only from 1788 to 1803.
[2] Superseded by the twelfth amendment, *below*, p. 847.

same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between a State and citizens of another State; [1] — between citizens of different States; — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the

[1] See the eleventh amendment, *below*, p. 847.

executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

SECTION 1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

SECTION 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

SECTION 3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affir-

mation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

Go: Washington —
Presidt. and Deputy from Virginia

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

ARTICLE I[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising

[1] The first ten amendments adopted in 1791.

in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[1]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[2]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant

[1] Adopted in 1798.

[2] Adopted in 1804.

of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII [1]

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV [2]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1] Adopted in 1865. [2] Adopted in 1868.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[2]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

[1] Adopted in 1870.
[2] Passed July, 1909; proclaimed February 25, 1913.

ARTICLE XVII [1]

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [2]

SECTION 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of submission thereof to the States by the Congress.

ARTICLE XIX [3]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.

SECTION 2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

ARTICLE XX [4]

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

[1] Passed May, 1912, in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same section as relates to the filling of vacancies; proclaimed May 31, 1913.

[2] Proclaimed January 29, 1918. Repealed by the twenty-first amendment..

[3] Proclaimed August 26, 1920.

[4] Proclaimed October 15, 1933.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified, and the Congress may by law provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI[1]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[1] Proclaimed December 5, 1933.

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